IN THE
Supreme Court of the United States
OCTOBER TERM, 1964

No. 48

UNITED MINE WORKERS OF AMERICA,
Petitioner

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, *Admx. of the Estate of* BURSE PHILLIPS, deceased,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S BRIEF

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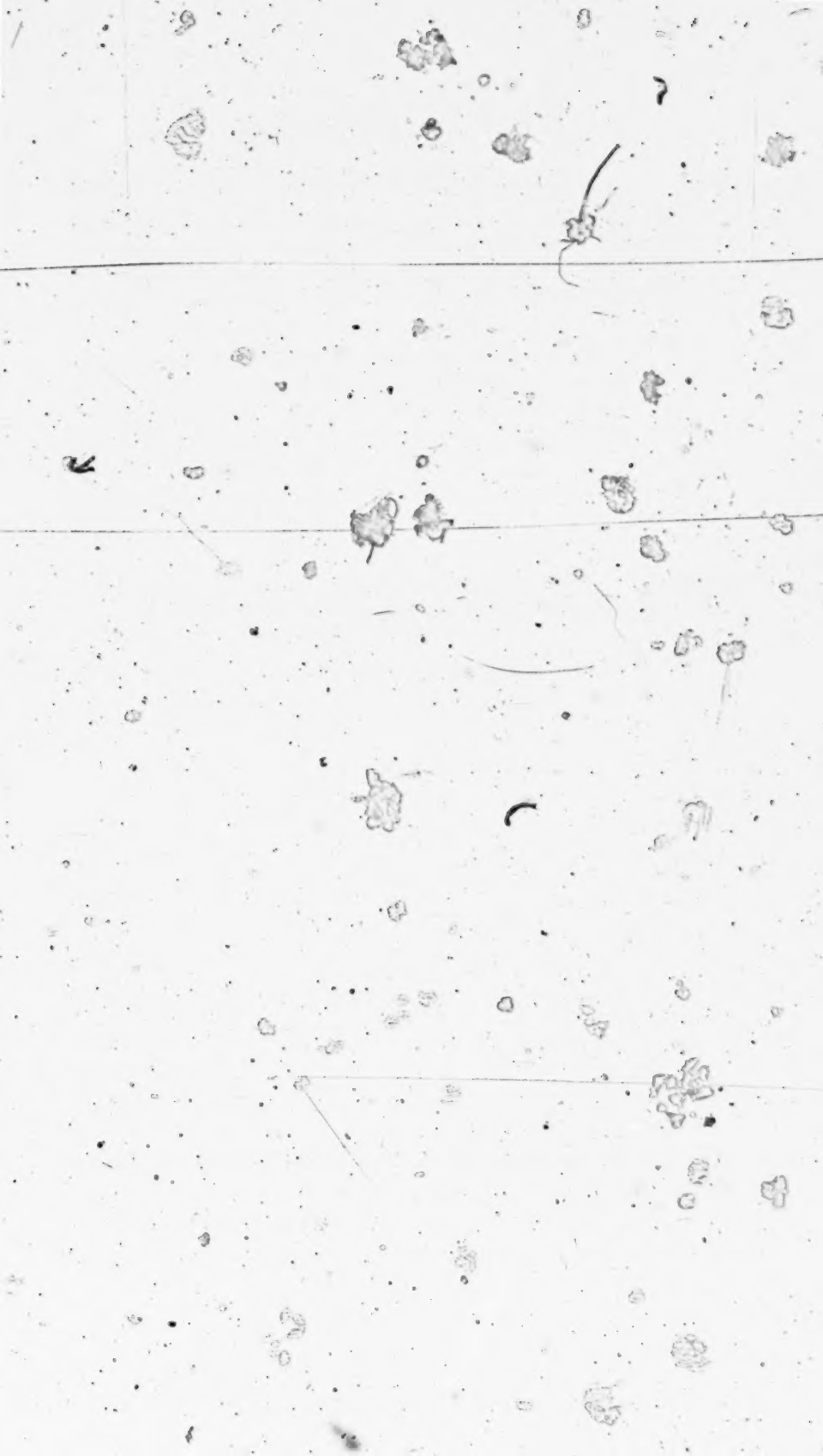

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OPINIONS BELOW

The district court's[1] Bench Opinion (R. 85a) is unreported. The Sixth Circuit's[2] opinion (R. 1743-68) is reported at 325 F. 2d 804 (1963).

JURISDICTION

The Sixth Circuit's judgment was entered December 18, 1963 (R. 1768). Petition for a writ of certiorari was filed March 17, 1964, and granted May 18, 1964 (R. 1769). This

[1] Reference is to the United States District Court for the Eastern District of Tennessee, Northern Division.

[2] Reference is to the United States Court of Appeals for the Sixth Circuit.

Court has jurisdiction under 28 U.S.C., Sections 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. May a labor union be held a conspirator under the Sherman Antitrust Act where it has achieved an industry-wide, multi-employer collective bargaining agreement, negotiated in accordance with procedures established by law, which results in stabilizing wage rates and working conditions at levels above the ability of some employers to pay?

2. Where a labor union and employer signatories to a collective bargaining agreement obtain from the United States Secretary of Labor, under the Walsh-Healey Act, a minimum wage rate for the bituminous coal industry on coal purchased by federal agencies, is such union activity conspiratorial conduct under the Sherman Antitrust Act?

3. Where a labor union is charged with having conspired with employer groups in violation of the Sherman Antitrust Act when it executed an industry-wide, multi-employer collective bargaining agreement in conformity with injunctive orders of a federal district court, union denials of the conspiracy are uncontradicted, and there is no direct evidence proving the conspiracy, may a court or jury infer the existence of a conspiracy from union activities either sanctioned under law or within the jurisdiction of the National Labor Relations Board. in light of the antitrust immunity of labor unions and the clear proof requirement of Section 6 of the Norris-LaGuardia Act?

4. Was there substantial evidence to warrant the jury's verdict of conspiracy and of damages under the Sherman Antitrust Act?

STATUTES INVOLVED

The statutory provisions involved are Sections 1, 2 and 3, Sherman Antitrust Act (15 USCA 1, 2 and 3); Sections 4 and 6, Clayton Act (15 USCA 15, 17); Section 20, Clayton Act (29 USCA 52); Sections 2, 4 and 6, Norris-LaGuardia

Act (29 USCA 102, 104 and 106); the Labor Management Relations Act, 1947 [29 USCA Sections 141, 151, 157, 158(a)(3), 158(b)(1)(A), 158(b)(3), 158(b)(4), 158(e), 185, 187; Fair Labor Standards Act of 1938, Sections 1 and 2 (29 USCA 201, 202); and the Walsh-Healey Act (41 USCA 35-45)].[3]

STATEMENT OF THE CASE

A. THE KIND OF ACTION AND THE JUDGMENT APPEALED

United Mine Workers of America (called "UMW") was held responsible to James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Admx. of the Estate of Burse Phillips, deceased a partnership, doing business as Phillips Coal Company (called "Phillips") for $325,000 for having pursued legitimate and regulated bargaining activities which Phillips claimed established wage rates and other conditions of employment he could not meet.

In an action instituted by Trustees[4] of the United Mine Workers of America Welfare and Retirement Fund[5] to recover a money judgment for unpaid royalties from Phillips as a signatory to the National Bituminous Coal Wage Agreement of 1950, as amended in 1952, 1955 and 1956, Phillips filed a cross claim against UMW (R. 19a), under "Title 15, USCA, Sections 1, 2 and 3", based upon an alleged conspiracy between UMW, Fund Trustees, and major coal companies (not made parties to the cross-claim) to force small mines out of business.[6]

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[3] These statutes are referred to herein as *Sherman, Clayton, Norris-LaGuardia, Taft-Hartley, Fair Labor Standards,* and *Walsh-Healey,* respectively. Pertinent statutory provisions are found in Appendix A to this brief (p. 1, *et seq.*).

[4] Trustees' action was originally filed by Trustees John L. Lewis and Josephine Roche. Subsequently Henry G. Schmidt was named as an additional Trustee-Plaintiff (R. 29a).

[5] Herein called "Fund"; its Trustees are collectively called "Trustees".

[6] It required an answer (filed February 14), an amendment (filed March 5), a second amendment (filed March 24) and a third amendment (filed June 26) to finalize Phillips' theory of the alleged conspiracy (R. 11a, 21a, 26a, 30a). Companies named as co-conspirators were Consolidation Coal, Peabody Coal, West Kentucky, Nashville Coal, Island Creek Coal, Pittsburgh-Midway Coal and The Pittston Co. (R. 49-50).

UMW denied the conspiracy charges, alleged that under Section 6 of the Clayton Act (15 USCA 17) negotiation and execution of the several Agreements by it as a labor organization and its conduct in their enforcement did not constitute *Sherman* violations, and asserted "all of the acts done by UMW" herein "were motivated by legitimate labor goals" to secure union standards of wages and working conditions for its members (R. 38-40a, 58-59a).

A jury[7] returned a verdict in Phillips' favor, responsive to a submitted verdict form (R. 85a)[8] that UMW had engaged in a "combination or conspiracy so as to unreasonably restrain trade . . . beyond the exemption created by the anti-trust statutes to a labor organization" as Phillips had alleged (R. 85a). UMW motions for judgment n.o.v. or for new trial (R. 64a) were overruled (R. 83a). Judgment for $270,000 (trebling the jury's damage award of $90,000) and $55,000 for attorneys' fees, favorable to Phillips, was entered (R. 82-4a).

Upon appeal the Sixth Circuit affirmed the judgment (R. 1768); and this Court awarded certiorari (R. 1769).

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[7] The trial produced a transcript of 3,539 pages and 175 exhibits. It commenced April 11, 1961; the jury considered of its verdict from May 17 to May 19, 1961.

[8] The verdict form read (R. 1578a): "Did the cross-defendant, U.M.W., engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross-plaintiffs, Phillips Brothers Coal Company?"

In Trustees' case (Case No. 14,810 in the Sixth Circuit), the trial court, after setting aside the jury verdict that Trustees had engaged in the conspiracy, entered judgment in favor of Trustees for $43,424.22 (R. 83a) and, upon Phillips' appeal, the Sixth Circuit affirmed (R. 1765-68). Phillips' petition for certiorari is pending as No. 39 in this Court.

B. THE ALLEGED CONSPIRACY: THEORIES, FACTS AND THE LOWER COURTS' OPINIONS THEREON.

1. Collective Bargaining in the Bituminous Coal Industry.

The bargaining history clearly demonstrates that the 1950 Agreement resulted from arms-length collective bargaining over a long period of time during which UMW was restricted in its bargaining efforts by federal court decrees and mandated to settle its bargaining dispute with coal producers. The 1950 contract was not an instrument of conspiracy.

(a) Operator-Union Disputes and Government Seizures of the Industry Prior to 1949.

From UMW's inception in 1890 its objectives have included improved standards of working and living conditions, achieved in a pattern of multiple-employer collective bargaining (R. 1097a, 1099a).

During 1943-48, UMW obtained increased wages, welfare fund benefits and other improved labor standards for its members, but only after seven work stoppages, accompanied by five federal government seizures and operations of mines (R. 262-3a), two Taft-Hartley Boards of Inquiry avowing shortages of coal, public needs and the absolute necessity that miners return to work, added to injunctive, contempt and unfair labor practice charges and proceedings against UMW by Federal officials and coal operators alike and assessments of large monetary fines against UMW.[9]

(b) The 1950 Agreement and the 1949-50 Negotiations and Federal Court Decrees Antedating Its Execution.

The National Bituminous Coal Wage Agreement of 1948 (herein called "1948 Agreement"), which had provoked operator litigation against UMW, expired June 30, 1949. A successor industry-wide, multiple-employer agreement (Na-

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[9] Some portions of UMW's struggle with operators in the pre-1949 period are told in the following litigation: *U. S.* v. *UMWA*, DC, D.C., 1946, 70 F. Supp. 42; *U. S.* v. *UMWA*, 330 U.S. 258-385 (1947); *Int. Union, UMWA, et al.*, 83 NLRB 916 (1949); *Int. Union, UMWA* v. *NLRB*, D.C. Cir., 184 F. 2d 392 (1950).

tional Bituminous Coal Wage Agreement of 1950) was executed by UMW and operators March 5, 1950.

Meanwhile, when there was no contract, and therefore no obligation for UMW members to produce coal, UMW directed 3-day work weeks (R. 539a) as a bargaining tactic. Mine workers knew that bargaining negotiations would not terminate as long as miners worked full time during the bargaining process. Three-day work weeks would "abate the public concern as to a possible shortage of coal" (R. 1104-05a, 1151-52a) and distribute the work during negotiations. UMW did not seek or want a 3-day work week in the 1950 negotiations (R. 1105a, 1187a).

Interim bargaining negotiations focused around three issues carried over from the 1948 Agreement, namely: operator complaint that (1) the union-shop clause in the 1948 Agreement did not comply with Taft-Hartley's requirements; (2) the welfare fund could not be administered for UMW members only, as operators claimed that Agreement provided; and (3) the 1948 Agreement's "able and willing" and "memorial period" clauses, operators complained, gave UMW control over working time of the mines.

The Injunctions of February 11, 1950 and UMW's compliance therewith

These complaints, resulting in failure of collective bargaining processes to achieve a labor contract, caused NLRB to issue and process an unfair labor practice complaint against UMW and its President. Then, a Board Regional Director and the United States Attorney General, harmonious to a Presidential Board of Inquiry Report, severally sought injunctive relief, responsive to which the federal district court, in two separate orders on February 11, 1950, enjoined UMW from insisting that (1) a successor agreement require UMW membership of employees "without compliance" with Taft-Hartley's requirements, (2) the agreement provide for a welfare and retirement fund to be administered for UMW members only and (3) the agreement contain the "'able and willing" and "memorial

period" clauses, and *ordered operators and UMW* to "engage in free collective bargaining *in good faith*" to resolve their disputes and "make every effort to adjust and settle their differences" as Taft-Hartley contemplated (R. 1476-8a).

Under district court scrutiny,[10] NLRB and Attorney General surveillance, with assistance of members of the Presidential Inquiry Board, *and with UMW's bargaining abilities circumscribed by judicial restraints,* UMW and operators, bargaining in good faith, achieved the 1950 Agreement, which, obedient to the February 11, 1950 injunction, created a union-security clause to comply with Taft-Hartley, made Fund benefits available to signatories' employees *regardless of UMW* membership, and eliminated the "able and willing" clause and amended the "memorial period" clauses.

UMW's full obedience to the district court's injunctive commands is manifested in dismissal of all court proceedings upon motion of the federal agencies involved (R. 1480a, 1483-86a), and in the district court's absolving UMW and Lewis of charges they had contemned the court's injunctive mandates.[11]

(c) Mine Mechanization Was An Existent Fact Prior to the 1949-50 Negotiations and Was Not an Issue in Those Negotiations.

Mechanization was not brought about by any conspiratorial agreement between UMW and coal producers. It was the inevitable result of increased technology. It was

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[10] During negotiations, the district court, in chambers, with some parties present, discussed negotiations and warned any negotiator leaving negotiating conferences would do so at peril (R. 1505a).

[11] UMW's struggle to achieve the 1950 Agreement is mirrored in litigation found in the following cases which show the limitations placed upon UMW by the federal court: *Int. Union, UMWA and H. C. Frick Coke Co., et al.*, NLRB Cases Nos. 5-CB-43 thru 47, 1950 (Unreported); *Penello, Regional Director, etc.* v. *Int. Union, UMWA*, DC, D.C., 1950, 88 F. Supp. 935; *U. S.* v. *Int. Union, UMWA*, DC, D.C., 1950, 89 F. Supp. 187; *U. S.* v. *Int. Union, UMWA*, DC, D.C., 1950, 89 F. Supp. 179; *U. S.* v. *Int. Union, UMWA*, D.C. Cir., 190 F. 2d 865 (1951).

decreed by the necessities of competition, not only upon coal producers but by competition from other energy sources.

Prior to 1950, mechanization was a normal procedure in the coal industry (R. 616a, 746-47a, 748a). In 1940 *mechanically loaded coal amounted to 35.4%* of all underground production and *by 1949* this had *increased to 67%* (R. 1724a). Likewise, of total production *22.2% was mechanically cleaned* and this was *increased to 35.1%* (R. 1724a) in 1949. *Indeed, Phillips' mining operations were highly mechanized* (R. 211a).

UMW never opposed mechanization (R. 1130a, 1218a), because of the free enterprise system and *UMW's belief that mechanization is a management prerogative to buy such equipment as management chooses and UMW does not "attempt to abridge it"* (R. 1214a, 1223a).

Had the coal industry not increased productivity with its attendant lowering of costs, it would have succumbed to its competitors—world competition in coal and competitive fuels such as oil, gas and diversified fuels made from coal or petroleum bases (R. 1130-1a). The 1950 Agreement was executed by operators, according to *Phillips' witness* George H. Love, because "it was our best judgment to conclude the contract and stop losing coal business to other fuels" (R. 545a).

The need of lower cost production through mechanization is shown in the coal industry's loss of markets when coal's share of the national energy market declined from 46.5% in 1945 to 36.9% in 1949 and from 34.8% in 1950 to 23.1% in 1958 (R. 1714a, 1131-34a).[12]

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[12] "How does an enterprise become efficient and profitable? How does it stay efficient and profitable in an increasingly competitive world? First of all, it must produce a commodity that customers are willing to buy in considerable volume at a price that is in line with the prices of competitive products and that yields a profit sufficient to attract investor capital. . . . To the extent that our economy automates, we will continue to have a sound basis for rising national income and a rising standard of living. To the extent that we fail to automate, nothing else we do can protect

In the period 1950-58, when the coal industry invested heavily in new machinery and equipment, coal production increased from 6.77 tons per man day in 1950 to 11.33 tons in 1958 (R. 1724a). In the same period, wages rose from an average of $16.08 per day in 1950 to $24.16 average in 1958.[13] But, as output per man increased as a result of mechanization, UMW insisted this higher productivity justified a higher rate.[14]

(d) Increased Labor Costs and the Pattern of Collective Bargaining in the Post-1950 Agreement Period.

In the 1946-48 period miners obtained wage increases of $4.05 per day, and the establishment of a welfare fund with royalty increased from the original 5¢ per ton in 1946 to 20¢ in 1948, in addition to a reduction in hours per work day (R. 266a, 267-68a, 271a). The 1950 Agreement increased wages 70¢ a day and royalty payments to the fund to 30¢ per ton.

In the 8-year period following the 1950 Agreement's execution, wage increases amounted to $9.50 per day, with a 10¢ royalty increase in 1952 (which has since remained unchanged).

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us from shrinking markets, economic stagnation, and difficulty in finding work for all those willing and able to work." "*Automation and Unemployment: A Management Viewpoint*", authored by Malcolm L. Denise, Vice President—Labor Relations, Ford Motor Company, and appearing in The Annals, (American Academy of Political and Social Science, March, 1962), pp. 90, 96.

[13] U. S. Department of Labor, Bulletin No. 1305, Technological Change and Production in the Bituminous Coal Industry, 1920-60, p. 118, Table 27A.

[14] In "*Industrial Relations and Automation*", The Annals, (*Ibid.*, pp. 69-80), Chas. C. Killingsworth, University Professor, Labor and Industrial Relations at Michigan State University, writes: "Labor economists generally agree that one result of collective bargaining over the past several decades has been the development of a far more systematic approach to wage structures and wage-payment systems . . . . *When output per man is sharply increased, as frequently happens in automation applications, the employees and their union may insist that this higher productivity justifies a higher wage rate . . .*" (pp. 75-76).

Phillips' theory that differences in bargaining patterns before and after the 1950 Agreement's execution show the conspiracy (*post*, p. 11) ignores undisputed facts that, while following the 1950 Agreement's execution, operators formed the Bituminous Coal Operators' Association (called "BCOA") to promote stable industrial relations on a national basis and representing coal producers and associations in Pennsylvania, Illinois, Indiana, Northern West Virginia, Ohio and Virginia (R. 394a), signatory operators include numerous other coal associations and coal producers with whom UMW bargained long prior to 1950 operators select their representatives, and UMW meet with such persons as the operators advised represented it as Taft-Hartley's Section 8(b)(3) [29 USCA 158(b)(3)] commands (R. 1247-48a).

UMW's policy committee selected its representative, whose authority came from the policy committee (R. 1248a). Following conferences between representatives of labor and management, respectively, each conferred with their respective associates; and the Agreement's consummation was effected only after additional negotiators were called in on both sides (R. 1247a). While there is no agreement to continue following this procedure, which may be changed with or without mutual agreement at any time (R. 393a), it was described as the only "vehicle . . . after 50 years, that can bring about in an orderly manner, without fanfare", a collective bargaining agreement (R. 1247a).

2. Phillips' Mining Operations; Its Execution of the UMW Agreement.

Phillips, organized in 1953 with a capital of $27,000, employing about 8 employees (R. 175a, 181-2a), and conducting a coal mine stripping operation in Campbell County, Tennessee, executed the 1952 Agreement October 1, 1953 (R. 117a, 178a). None of Phillips' employees then belonged to UMW (R. 179a).

On April 6, 1955, a caravan of coal miners visited several operations in Campbell County. Apprised thereof, Phillips ceased operations (R. 184a) and it was not operating on

April 11, 1955, when 50 or 60 men came to Phillips' operation and stated they had come to "shut us down" until all of Phillips' employees joined the Union (R. 184-87a).

Phillips again executed the 1952 Agreement in 1955, and thereafter executed the 1955 and 1956 Agreements. Its employees joined UMW on April 24 or 25, 1955 (R. 229a).

3. Phillips' Theories of the Alleged Conspiracy.

The conspiracy's formation, Phillips charged, occurred when the 1950 Agreement was executed, its purpose being to stabilize the bituminous coal industry's economics by eliminating therefrom small producers unable to pay high wages and welfare fund royalties and the conspirators knowing and intending these smaller companies would go out of business by reason of such inability (R. 1542a), thereby leaving the industry's business to major coal companies.[15]

According to Phillips, the conspiracy included UMW agreement to surrender to operators its policy of controlling working time at the mines, *although (1) production time never became a bargaining issue, since UMW was enjoined from demanding the clauses which operators contended gave UMW control over working time, and (2) operators had succeeded in enjoining UMW from bargaining concerning such clauses, thereby obviating operators' negotiating with UMW for matters they had already won in the injunction litigation.*

Despite the fact mechanization was an existent fact prior to the 1949-50 negotiations and was not an issue therein, Phillips contended the conspiracy included UMW's acquiescence for large companies to increase productivity through mine mechanization, as well as UMW's willingness that mines incapable of mechanization be closed despite the resultant loss of UMW membership (R. 31a).

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[15] Theories advanced by Phillips are found in the certified record, pp. 49-56a, 1538-43a. Theories of UMW to defeat recovery by Phillips are found at pp. 57-60a, 1543-45a.

In exchange, as Phillips theorized, major coal companies agreed not to object to increased wages and welfare fund payments, subject to operator ability "to match those increases by increased productivity through mechanization" (R. 32a), and to permit UMW to control the Fund and dominate the industry's employees.

The conspiracy's purposes, Phillips theorized, were to be achieved through the National Agreement's use (R. 1539a). Lack of industrial strife in the industry following the 1950 Agreement with attendant increases in wages and welfare fund payments, increased UMW organizing activities, the Agreement's land-lease and protective wage clauses, UMW-operator efforts to obtain a Walsh-Healey Act minimum wage determination and to have TVA comply therewith, and mechanization of mines, and UMW investments in two major coal companies, were among the elements, Phillips contended, which proved the conspiracy Phillips alleged was formed in 1950.

4. UMW Officials Deny Any Conspiracy

UMW officials denied the charged conspiracy and denied making any agreement other than the 1950 Agreement. *These denials are not disputed.*

5. The Jury Rendered a General Verdict

The trial court permitted the jury to hear testimony pertaining to each of the elements enumerated above. In a *general verdict,* the jury found UMW had conspired outside and beyond labor's immunity under *Clayton's* Section 6.

6. The Trial Court's Opinion and Doubt

The jury did not specify upon which of the elements it premised its finding or with whom UMW supposedly had conspired. Upon post-verdict motions for judgment n.o.v. or for new trial, the trial court tacitly rejected all

of the elements noted (*ante*, pp. 11-12) as proof of the alleged conspiracy.[16]

The trial court justified the jury verdict against UMW *solely* upon its statement that "*There is some proof . . . that Union representatives and large coal operator representatives discussed stabilization of prices at one time or another during the critical periods referred to in the cross-claim*" (R. 87a).

The Trial Court Declared that 1950 Court Proceedings and Negotiations Accordant Therewith Weakened, if Not Destroyed, Phillips' Conspiracy Allegations. Its Opinion Ignores That Evidence.

On UMW's motion for directed verdict (R. 1524a), federal court proceedings which preceded the 1950 Agreement's execution (discussed, *ante*, pp. 6-7) occasioned the trial court's comment the 1950 court proceedings and negotiations pursuant thereto "*put a grave burden upon*" Phillips, expressing they "*greatly weaken, if not destroy*", Phillips' conspiracy charges (R. 1524-33a). They indicated to the trial court "*these parties were acting through regular channels*" and "*were bargaining with each other*" and "*weren't acting in concert*" but acted "*because they were made to act*" (R. 1527-8a).[16a]

The trial court's dubiety finds expression in its further statement, "*This is not an easy case*" but "*a very complex*" one, as well as its recognition that the union's motion

[16] Other elements which Phillips contended proved the alleged conspiracy were rejected by the trial court, which noted, "Trustees testified positively that the Union did not dominate or control the Fund" and "The evidence is insufficient to show the contrary" (R. 98a). Likewise, the trial court expressly rejected Phillips' contention that UMW control of the Fund and domination of the employees were to be achieved by the requirement that union membership was a prerequisite for obtaining Fund benefits after 1950, that Trustees required pensioners to picket for UMW in order to obtain or retain Fund benefits and that Trustees held out to industry employees the Fund was under UMW control (R. 98a).

[16a] Unless otherwise indicated, all emphasis herein are supplied.

for directed verdict is a *"serious motion and is a debatable motion, certainly"* (R. 1532-33a).

Notably, in denying UMW's post-verdict motions, when it assigned the sole basis for upholding the verdict, the district court failed to explain away its concern noted above.

7. The Sixth Circuit's Opinion Ignores the District Court's Assigned Reason. The Elements the Sixth Circuit Employed to Sustain the Jury's Finding as to Conspiracy, and the Facts Pertaining Thereto.

UMW's appeal was argued October 20, 1962 (R. 1743). *Fourteen months later*, on December 18, 1963, the Sixth Circuit affirmed the district court's judgment (R. 1768).

The Sixth Circuit abandoned and ignored the district court's reason for sustaining the jury verdict (*ante*, p. 13). The Sixth Circuit's opinion makes no mention of the 1950 federal district court proceedings and directives and the negotiations antecedent to the 1950 Agreement's execution which had so grossly concerned the district court, nor does it mention the trial court's concern or dubiety.

The Sixth Circuit noted, *without challenge*, UMW's contention there was no direct evidence of the alleged conspiracy (R. 1753). Notably, in avowing "the following background was given to the jury" (R. 1753-54), the Sixth Circuit stated *as facts* the *theories advanced* by Phillips and related to the jury *as theories* (R. 1538-43a). It did not undertake a "review of the evidence in detail"; instead, it chose what it regarded as some *"principal factual aspects"* which, together with inferences drawn by the jury, led to the Sixth Circuit's conclusion "there is *substantial evidence*" to support the jury verdict (R. 1752). Among these are:

(a) Violence and UMW's Knowledge of the Effect of Increased Labor Costs on "Weaker" Companies.

Pointing to wage increases of $9.50 per day during an eight-year period (1951-58 since the 1950 Agreement was executed) and the 1952 increase of welfare fund payments from 30¢ to 40¢ per ton (since which time no increase had

been had in such payments), and though there is no record basis that the wage increases were too high,[17] the Sixth Circuit, observing there was an intense campaign after 1950 to impose UMW's contract on "smaller nonunion mines" and that strong resistance was met with "mobs and terrorism", declared *"We think the evidence supports" Phillips' contention the "Union knew that the weaker companies could not meet the increased costs of wages and welfare fund payments required by the successive wage agreements and that they would fall by the wayside by reason thereof, and that the increased costs in the successive agreements were geared to the abilities of the major coal companies to mechanize and not have their profits affected by the increased costs"* (R. 1756).

Though the evidence showed Phillips had ceased operations when pickets came to its operation (*ante*, p. 10), the

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[17] A U.S. Department of Labor bulletin on "Bituminous Coal Mining", styled "Industry Manpower Surveys No. 106", p. 15, dated December, 1963, shows that in *1947*, coal mining had the highest annual earnings among comparable industries; but by 1962 it had the lowest.

There were no increases in the coal industry from September, 1952, to September, 1955, during which period there were increases in the automobile, steel, rubber, and copper industries. See Excerpts from BNA, Collective Bargaining—Negotiations, which are found in Appendix B hereto, pp. 19-28a.

In fact from 1950 through 1958, there were fewer increases in the coal industry than in steel, automobile, copper, rubber and oil industries. See Appendix B, pp. 21-28a.

Based on published statistics of the Department of Labor, Bureau of Labor Statistics, the average weekly earnings of bituminous coal miners in 1950 and 1960, compared with three other basic industries were as follows:

Industry	1950 Average Weekly Earnings	1960 Average Weekly Earnings
Bituminous Coal	$67.46	$112.77
Petroleum Refining	$75.11	$118.78
Blast Furnace, steel works & rolling mills	$67.95	$116.13
Automobiles	$74.85	$115.21

Sixth Circuit pointed out "There is evidence to the effect that UMW forcibly closed down Phillips' mine by the presence of armed mobs which intermittently marched through the countryside"; and though the Sixth Circuit admitted that violence "in and of themselves are not material" in determining the conspiracy, inconsistently it declared that "however, it was not error for the jury to consider such evidence as bearing on the overall issue of whether such acts were done as part of a conspiracy to restrain competition or create a monopoly" (R. 1751).

(b) The "Land-Lease" and "Protective Wage" Clauses in the National Agreement.

Two other "principal factual aspects" relied upon by the Sixth Circuit to warrant the jury's inference are the so-called "land-lease" and "protective wage" clauses of the National Agreement which the *trial court* told the jury were lawful and not violative of *Sherman*, provided they were inserted at UMW's insistence for legitimate labor goals and were "not the result of an agreement with large coal operators to drive small operators out of business" (R. 1558a). Both clauses sought legitimate labor goals (R. 448a, 1109-10a, 1206a, 1207a). Both were insisted upon by UMW and resisted by operators (R. 1111a, 1201a, 1205-6a).

Under the land-lease clause, operators agreed the Agreement "covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this Agreement" (R. 445a, 1200a, 1739a).

This provision has its genesis in a 1943 Agreement when it read, "The operators agree that they will not lease *any operating mines* subject to the supplemental agreement as a subterfuge for the purpose of avoiding the provisions of

this supplemental agreement" (R. 1198a). It so appeared in the 1945 National Agreement (R. 1199a). In the 1952 Agreement and subsequent amendments the provision was expanded to cover "coal lands" owned or held under lease by operators or acquired by them. UMW officials' uncontested testimony is that its purpose was *solely* to protect "wage standards and the conditions of the working miner" (R. 1109a, 1201a), to prevent coal operators from repudiating their agreement, and to tighten up the processes of collective barganing (R. 1201a).

The Sixth Circuit declared (R. 1757), "The evidence showed that there was a large reserve of coal lands owned or held under lease by the major coal companies" and that "It is argued that this provision barred the small coal companies that could not pay the union wage and the royalties to the Welfare Fund from operating this land and that there was but little good coal land available to them as a result of this provision", although T. Reed Scollon, Chief of Division of Bituminous Coal, Bureau of Mines, U. S. Department of Interior (R.1280a) testified that at the present rate of coal consumption "there are proved reserves of coal for about *seventeen hundred years*" (R.1310a) and that *in 1958 there were in excess of 8,000 mines producing coal for consumption, of which number more than 2,000 were in Phillips' class (Class 5) and almost 5,000 small producers of less than 10,000 tons annually, all sharing in such coal reserves* (Ex.151-A, R.1719a).

The "protective wage" clause, as the Sixth Circuit stated, "contained a clause which provided that the signatory operators would not buy, sell or deal in coal mined by companies that did not pay the same labor costs as contained in the Wage Agreement" (R. 1757). Continuing, the Sixth Circuit declared (R. 1757), "The major coal companies had the practice of frequently buying coal from the smaller companies to apply on their large long-term contracts. This market was eliminated for those small com-

panies that could not operate under the provisions of the Wage Agreement."[18]

The "protective wage" clause sought, according to its terms, "to provide the maximum possible continuity and stability of employment" of UMW members, signatory operators agreeing, *inter alia*, not to deal in coal produced by other operators under labor standards lower than those provided in UMW's contract. The clause's purposes, undisputed evidence shows, had to do with "substandard mines" because of their structure and inefficiency (R. 448a). The clause "is a continuation" of UMW's efforts over years to have an agreement which would prevent operators from vitiating the agreement signed by them "by entering into some kind of a lease or by purchasing coal, closing their own mines down, from sub-standard mines that were paying sub-standard wages" (R. 1206-8a, 1110a).

(c) UMW Investments in West Kentucky Coal Co. and Nashville Coal Co.

The Sixth Circuit's opinion notes (R. 1757) UMW's investments in West Kentucky and its subsidiary, Nashville Coal, concluding "it was not unreasonable for the jury to conclude" UMW's purpose was "to have a very material voice, if not the dominant one, in determining the policies and operations of these two major coal companies" (R. 1758).

While Phillips charged the conspiracy's formation occurred when the 1950 Agreement was executed, UMW's first purchase of West Kentucky stock was not made *until 1951. Not until 1954* did West Kentucky become signatory to the National Agreement and only upon evidence

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[18] The protective wage clause was in the *1958* Agreement executed December 3, *1958; it did not become effective until April, 1959* (R. 1207a) *which does not fall within the stipulated* (R. 63a) *damage period of time involved in this case, such period ending December 31, 1958;* hence, it could not be regarded as having any probative value of the alleged conspiracy. Pertinently, Phillips did not execute the 1958 Agreement.

that West Kentucky's employees had, by written designations, selected UMW as their bargaining representative (R. 1444a).

The Sixth Circuit's use of UMW investments and its conclusion as a basis for the jury's conspiracy finding are challenged by *undisputed facts*. UMW's ownership of stock in West Kentucky and Nashville Coal was to benefit its members and to afford them work opportunities at West Kentucky (R. 1123-24a, 1126a, 1164a). In addition, UMW held no controlling interest in West Kentucky (R. 591-94a). Six witnesses attest UMW neither made suggestions nor proposed policies with reference to the two companies' management or pricing policies (R. 1445a, 492a, 585a, 1127a, 1128a, 1211a, 1404a, 1406a). UMW has nothing to do with Kentucky's management or its Board of Directors (R. 492a, 1126a).

The Sixth Circuit also ignored the District Court's jury charge that UMW had a right to make such investments and it was not a *Sherman* violation so to do (R. 1557a).

(d) UMW Efforts To Have the U. S. Secretary of Labor Establish Minimum Wage Rates for the Coal Industry Under Authority of the Walsh-Healey Act and to Have TVA Comply With Them In Government Coal Purchases.

In 1936, Congress enacted the Walsh-Healy Act whose purpose this Court avowed is "to use the leverage of the government's immense purchasing power to raise labor standards".[19]

In 1955 and 1958 UMW, Consolidation and other coal companies petitioned United States Secretary of Labor Mitchell to promulgate a minimum wage [not prices (R. 465a)] for the bituminous coal industry on coal purchased by government agencies (R. 457-8a, 1625a, 1634a); public hearings at which both UMW and operators' representatives testified (R. 458a, 1634-8a) resulted in the Secretary

[19] (R. 1626-7a, citing *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 and *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940).

of Labor's orders setting a prevailing minimum wage for coal industry employees (R. 466a, 1620-1a).

At the 1956 UMW Convention (R. 467a), Secretary Mitchell, introduced by John L. Lewis, in a speech, said: "As you know, about a year ago the Secretary of Labor, for the first time in history, found a minimum wage in the coal industry which controlled the wages that were to be paid to workers who worked on government contracts.[20] We purposely sought that determination in order to exclude from government bidding those non-union mines which are a detriment to the industry" (R. 466a). Mitchell noted that coal was "one of our basic resources" and determination of the minimum wage was "for the benefit of our national security" as well as benefit of the worker and the fair employer (R. 468a), and that in the national interest "it is necessary for us to see that those operations which can produce coal quickly and efficiently are kept alive to the extent possible by government purchasing in peace time" (R. 469a). Mitchell told the Convention he was investigating if TVA was evading the Walsh-Healey determination, with assurances of correction, if any, and believed the enforcement policy to be "in the interest not only of the worker but is in the interest of the fair employer to prevent the chiseling, non-union employer from competing in the market place with fair employers who hire union labor" (R. 467a). Continuing, Mitchell noted it was likewise "for the benefit of our national security" because when strip and non-union mines "which pay people a miserly wage exist and deprive union-operated mines

[20] While the Sixth Circuit points out (R. 1758) that the minimum wages so determined were "materially higher, in most instances twice as high" as those determined under Walsh-Healey in other industries, pertinently Secretary Mitchell's determination was affirmed in *Ruth Elkhorn Coals, Inc.* v. *Mitchell, Sec'y of Labor*, D.C. Cir., 248 F. 2d 635 (1957), cert. den. 355 U.S. 953. In any event, Walsh-Healey wage determinations are based upon existing prevailing minimum wage structures in a given industry. Wage rates paid in other industries, whether higher or lower, are irrelevant to the determination.

of business, you are thereby reducing your strategic potential in time of emergency. So, it is our job as government officials to see to it that the potential production is kept at the highest possible level'' (R. 468a).

In 1958, upon request of UMW and operators and after hearing thereon, the Secretary of labor raised the prevailing wage in the coal industry 50¢ an hour (R. 470-3a, 1634a).

UMW criticized TVA's paying ''lesser and lesser amounts for'' coal and using the tremendous influence of TVA's purchases of coal *''to decrease the living standards of the men''* (R. 1625a) and *''ignoring safety standards and health conditions . . .''* (R. 1627a). It was not a ''question of union or non-union mines'' (R. 1632a).

UMW criticized TVA's policy of purchasing coal on contracts of less than $10,000 (R. 474-6a). A UMW representative attended a meeting in March, 1958, as did TVA directors, representatives of Southern Coal Producers Association, Southern Coal Sales and Inter-Mountain Coals, when coal producers requested TVA obtain most of its coal on term contracts rather than the spot market (R. 781-3a).

At a March 20, 1958 meeting coal company representatives suggested TVA ''limit [its] spot purchases to approximately ten per cent of [its] total requirements'' (R. 832-3a). UMW urged TVA officials *''to patronize those concerns that paid the American standard of wages''* and that TVA comply with Walsh-Healey requirements in awarding contracts (R. 1138-9a).

The Sixth Circuit held ''it was a reasonable deduction'' for the jury to ''make that the wage determination for the coal industry under the Walsh-Healey Act . . . materially and adversely affected the operations of Phillips in the important TVA market, thus contributing to the elimination of the company as a competitor to the large producing companies operating in that area . . .'' (R. 1760-61).

The Sixth Circuit rejected UMW's contention that evidence concerning the *Walsh-Healey* determination was permissive conduct under *Eastern Rr. Presidents Conference*

v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), as UMW contended, saying (R. 1764), "We do not construe the *Noerr* ruling as creating an unlimited exemption to Sections 1 and 2 of the Sherman Antitrust Act. We believe that the *Noerr* ruling had reference to conduct which in good faith looked to the enforcement of the law or a modification of an existing policy, unaccompanied by a purpose or intent to further a conspiracy to violate a statute. It is the illegal purpose or intent inherent in the conduct which vitiates the conduct which would otherwise be legal".

Likewise the Sixth Circuit placed the Secretary of Labor, who did no more than carry out his statutory duty, in the role of a co-conspirator.

(e) West Kentucky's Bidding and Sales on the TVA Market.

The Sixth Circuit observed that in 1956-58 four of the major coal companies (which had been named as co-conspirators) which included West Kentucky, Nashville Coal, Pittsburgh Midway Coal Co. and Peabody Coal Co., "made large offerings of tonnage on the TVA spot market at generally declining prices, with a number of such bids being successful"; that there was evidence that "heavy offerings of West Kentucky coal on the TVA spot market would have the effect of bearing down on the price heavily" (R. 1760).

The Sixth Circuit concluded "it was a reasonable deduction which the jury could make that the wage determination . . . under the Walsh-Healey Act and the dumping of West Kentucky coal on the TVA spot market materially and adversely affected" Phillips' operation in that market, thus contributing to Phillips' elimination as a competitor "to the large coal-producing companies operating in that area, including the West Kentucky . . ., in which the UMW had such a dominant interest" (R. 1760-61). However, the Sixth Circuit neither states such sales were conspiratorially motivated nor points to any evidence from which a conspiracy between these companies, with or without UMW, could be inferred.

The TVA Coal Market

TVA had purchased coal for twenty years. During the 1950's, coincident with TVA's construction of major steam plants, TVA became the nation's largest purchaser of coal. Its annual consumption rose from one-half million to twenty million tons (R. 800a, 809a). TVA purchased coal by *"spot"*, *"term"* and *"negotiated"* contracts. *Spot* and *term* purchases are made after advertising for bids with awards to low bidders. *Spot* contracts call for delivery within thirty days. TVA's *spot* program is designed to gear its coal receipts to consumption, the amount purchased being established by the difference in anticipated receipts from *term* contracts and expected consumption (R. 824a, 826a, 830a). TVA awards are determined on *delivered* BTU cost, and this computation is made on consideration of tonnage price, transportation costs and by BTU content of the coal involved (R. 790-92a, 836a). TVA divided its plants into "Eastern" and "Western" Sections. Transportation charges were such that coal suppliers to TVA were competitive in either TVA's Eastern or Western Section, but not in both. Phillips sold its coal in TVA's Eastern Section.

> *TVA Coal Prices in 1956 Resulted From Extraordinary Circumstances. The Decline From This Price Resulted From Forces Unrelated To The Alleged Conspiracy.*

Phillips received a higher price for coal on the spot market in early 1956, particularly at TVA's Kingston Steam Plant. The price declined over the period 1956-58 (R. 1644a). The Sixth Circuit found this decline resulted from bids made by alleged conspirators.

The evidence shows, however, the 1956 price was the highest price on the TVA system in the five-year period 1954 through 1958 (R. 1659a). The price pattern is graphically portrayed on a chart attached hereto as Appendix C (A. 29a).

The 1956 price peak resulted from unusual circumstances. TVA demand for coal was at an all-time high (R. 1659a); nationwide demand was at a post-Korean war high (R. 1724a). Moreover, at the time of the 1956 price peak "emergency conditions" existed at the Kingston plant. Coal stock-piles fell to a 7-day supply. As a result TVA bought heavily on the spot market, buying at one point all spot coal offered at a price far above the 1955 average. TVA, to further relieve the situation, transferred coal to Kingston from normally uncompetitive western sources (R. 790a, 1327a) and negotiated contracts for additional coal (R. 811a).

TVA's total purchases of coal in 1957 declined by 1,000,000 tons and by another 2,000,000 tons in 1958 (R. 1729a). This was the period of the price decline the Sixth Circuit found resulted from the conspiracy. *TVA, in its 1957 Annual Report, took a sharply different view* (R. 1509a, 1511, 1512a), observing its decrease in coal purchases "resulted from the completion of the stockpile buildup plus the favorable hydroelectric supply situation" (R. 1509a). In its 1958 Annual Report, TVA attributed the lower cost of coal to "business recession, several freight rate reductions, reduced purchases and increased mechanization of mines" (R. 1511-12a).[21]

During the same three-year period *national production* of bituminous coal *fell* from 500,000,000 tons in 1956 to 410,000,000 tons in 1958, the lowest level of production in twenty years, save for one year (R. 1724a). *Total Tennessee production* fell from 8,847,000 tons in 1956 to 6,784,000 tons in 1958 (R. 1725a). The sale of Tennessee coal to TVA similarly fell from 6,900,000 in 1956 to 4,763,000 tons in 1958 (R. 811a, 813a). *The intensification of competitive pressure indicated by this slack in demand for coal was heightened*

[21] TVA's 1958 Annual Report records "TVA continued to encourage greater mechanization in mines and improvements of mining methods" (R. 1512a).

by an influx in 1956 of coal producers in the area.[22] Though the Sixth Circuit emphasized the price decline, it discussed neither the reasons for the 1956 price peak nor the economic factors, detailed herein, causing the decline; instead it inferred the decline was the result of the conspiracy.

Bids Of The Alleged Consiprators On The TVA Market.

The Sixth Circuit found that "About the end of 1956 the price of coal on the spot market began to decline, which continued through 1957 and 1958 . . . During 1956, 1957 and 1958 Pittsburgh-Midway Coal Co., Peabody Coal Co., West Kentucky Coal Co. and Nashville Coal Co. . . . made large offerings of tonnage on the TVA market at generally declining prices" (R. 1760).

No evidence supports the inference of UMW responsibility for the pricing practices of any of these companies or the inference that prices to TVA by these companies resulted from agreement.

But apart from this, the Sixth Circuit's conclusion is erroneous. The price decline, as is shown on the chart comprising Appendix C, started *in* May, 1956, and not "about the end of 1956". By the end of 1956, the price of coal at Kingston was nearly four cents per million BTU's below its peak. Its low in 1957 and 1958 was only one and one-half cents below the 1956 low. Significantly, during the 1956 decline, neither Pittsburgh-Midway, West Kentucky nor Nashville sold a ton of coal on the TVA spot market

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[22] The number and classes of producers (based on annual production) in Tennessee during the years in question are as follows (R. 1720a):

	These Amounts in Tons:						
Year	Class 1 500,000 and over	Class 2 200,000 to 500,000	Class 3 100,000 to 200,000	Class 4 50,000 to 100,000	Class 5 10,000 to 50,000	Class 6 under 10,000	Total
1955	0	5	9	14	90	386	504
1956	1	7	9	21	107	388	533
1957	0	7	11	14	83	376	491
1958	0	5	2	20	97	376	500

and Peabody sold only 32,000 tons during that same period —32,000 tons on a 4,000,000-ton annual market (R. 1647-55a). Pittsburg-Midway and Peabody sales to the spot market in 1957 and 1958 continued light (R. 1647-51a).

West Kentucky sales were singled out by the Sixth Circuit (R. 1760) with the condemnation that "the dumping" thereof on the TVA spot market "materially and adversely affected" Phillips' operations in that market. Analysis of West Kentucky bids do not support the Sixth Circuit's charge.

In 1956—the year when the price decline started—none of West Kentucky's bids, which were above the market, resulted in an award (Ex. 102, R. 1652-55a). From September, 1957 through March, 1958, of twenty-two bids made by West Kentucky for its Uniontown Mine where a substantial quantity of West Kentucky coal sold to TVA was mined, it received only six awards (Ex. 169, R. 1730a). All of these successful bids were to TVA's Shawnee plant which was favorably situated to West Kentucky for barge shipment (R. 1389a, 1713a). An analysis of the bids and the awards made (Ex. 169, R. 1730a) show that on the declining spot market West Kentucky *followed but did not lead the market* and that on the few occasions it was successful as a bidder it was the highest, or nearly so, of the successful bidders.

Moreover, West Kentucky bids on the TVA spot market were a matter of business judgment lawfully motivated by a need for sales. West Kentucky sales followed termination of two contracts, both of which, because of their termination, are significant in this case. One was a three-year TVA term contract for 350,000 tons a year which expired in June, 1957 (R. 1386-87a, 1398a). The other was a twenty-year total requirements contract with Tampa Electric Company providing for at least 450,000 tons per year. In April, 1957, West Kentucky advised Tampa it would not perform the contract because, in West Kentucky's view, it was void under the antitrust laws (R. 914-15a, 1436a, 1438a).[23]

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[23] See *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961).

These terminations intensified West Kentucky's need for a market. In 1957 and 1958 West Kentucky sales to TVA were far below its previous sales.[24]

West Kentucky's Vice President in charge of sales to TVA testified that spot bids were made "to relieve the situation at our Uniontown Mine . . . until such time as I could obtain a term contract" (R. 1404a); that bids were his responsibility and he formulated them with only occasional discussion with other West Kentucky officials; and that he had never discussed bids either with other companies or with UMW. This testimony is undisputed. It is confirmed by five witnesses (R. 1139a, 1189a, 1254a, 1339a, 1435a).

Evidence that the spot market decline substantially occurred prior to significant West Kentucky sales thereon and of West Kentucky's need for that market was not discussed by the Sixth Circuit.

C. THE ISSUE OF DAMAGES: THE JURY'S AWARD AND THE SIXTH CIRCUIT'S OPINION PERTAINING THERETO.

The Sixth Circuit approved Phillips' contention that but for the conspiracy it would have received *the national average price for coal* during the years 1956-58 and not the price it received, affirming the jury award for $90,000, which the trial court trebled in entering judgment (R. 84a). The award is predicated upon the following figures showing Phillips' TVA shipments during 1956-58 and Phillips' receipts therefor as compared with the national average:

[24]

Year	TVA Coal Receipts	West Kentucky (and Nashville Shipments)	Type Sales	Percent of TVA Market
1954	10,196,290	978,824		9.6
1955	14,377,000	1,298,923		9.0
1956	20,354,000	1,511,987	All term.	7.4
1957	19,581,879	963,384	Includes 313,000 spot	4.9
1958	17,033,466	1,094,396	198,000 spot	6.4

Year	Phillips' TVA Shipments	Phillips' Receipts	National Average
1956	14,128.70 tons	$3.92	$4.82
1957	19,717.67	3.20 1/3	5.08
1958	25,603.03	3.13 1/3	4.86

The "national average price" for coal, the evidence shows, contemplated the price received for *all* types of coal: underground and strip, premium and mine run, metallurgical, coke, industrial, commercial stoker, utility, etc. It contemplated, too, the average price on *all* markets, and not just the market relevant to Phillips.

1. The Evidence Is Positive That the National Average Price of Coal Does Not Afford a Valid Basis of Comparison With Phillips' TVA Coal

(a) The National Average Price of All Coal Is Substantially Above the National Average Price of Strip Mine Coal.

Phillips was a strip mine coal operator (R. 175a). Phillips' authority, namely, The Bureau of Mines Mineral Yearbook, to establish the national average price of *all* coal shows this comparison in national average price for all coal and the national average price for strip mine coal (R. 1468-9a, 1733a):

	All Coal	Strip Mine Coal
1956	$4.82	$3.74
1957	5.08	3.89
1958	4.86	3.80

State by state averages for 1957 and 1958, compiled by The Bureau of Mines, show the typical differential in the price of underground mine coal and strip mine coal (R. 1728a) and show, moreover, the differential was not a regional phenomenon.

This alone, UMW insists, invalidates Phillips' theory.[25]

[25] The comparison Phillips would make is further invalidated by average prices for Tennessee. In 1957 and 1958 the average price for Tennessee *underground mine coal* was $4.25 and $3 99. In the same years average Tennessee *strip mine prices* were $3.38 and $3.67 (R. 1728a).

(b) The Utility Market Is the Lowest Coal Market In Price and That Market May Not Be Compared, Price-Wise, With the Average Market for all Coal.

The evidence is uncontradicted that *the utility market for coal is the cheapest* of all major coal markets.[26] Premium coals suitable for domestic use sell for two to three dollars FOB mine higher than utility coals; commercial stoker coal is at least one dollar above utility coal; metallurgical coal commands at least two or three dollars per ton more than utility coal; and coke and industrial coals also command a greater price than utility coals (R. 1266-67a; 1341-47a).

The national average price of coal necessarily contemplates sales on these differing markets. Percentage-wise, during the years in question, coal was sold to these markets as follows (R. 1715a):

Year	Industrial	Coke	Utility	Retail	Railroad
1956	25.7%	24.5%	35.8%	11.2%	2.8%
1957	25.2	26.1	38.1	8.6	2.0
1958	26.8	21.0	42.0	9.2	1.0

Tennessee does not afford a market for quality coals comparable to the national market. During the years in question from 70.2 to 78 per cent of Tennessee coal was sold to TVA's utility coal market (R. 813a).

These facts demonstrate the legal inefficacy of comparing the average price of all coals with the average price Phillips received for strip mine coal sold only on the utility market.

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[26] There is also a difference in utilities. TVA plants are equipped to burn the most impure coal. Some utilities burn coal of 10% ash while TVA can burn coal with 16% ash. TVA specifications have resulted in making large quantities of coal merchantable, thus the widest possible range of coals compete in the TVA market (R. 818a, 1342a).

(c) Phillips Sold Coal on TVA's Lower Priced Spot Market and Not Its Higher Priced Term Market. This Further Invalidates Comparison of Phillips' Price With the National Average Price.

Prices on TVA's *spot* market average one and a half to two cents per million BTU's [or about 50 cents per ton (R. 1396a)] less than TVA's *term* market. *The spot market,* in other words, *was the lowest part of the low-priced utility market.* The difference in price reflects the responsibility required under term contracts (R. 1334a). That Phillips received less for his coal on the TVA spot market than the national average price of coal finds obvious explanation in this fact, in positive conflict with the Sixth Circuit's affirmance of the jury's verdict.

(d) Phillips Sold Premium Coal Separately From Utility Coal But Excluded the Price Received Therefor in Comparing Its Average With the National Average.

An *additional* and *unanswerable* reason for voiding the comparison the jury accepted is found in the fact that Phillips removed its premium (block and egg) coal from its production and sold this premium coal separately from its utility coal for prices well above the prices received for its utility coal, *but did not include receipts for its premium coal in the "Phillips average price" it compared with the national average price of all* coals (R. 207-8a).

Exhibit 173 (R. 1733a) makes the same comparison but takes into account all grades of coal mined by Phillips:

	Phillips' Average Utility Coal	Phillips' Average All Coal[27]	National Average All Strip Mine Coal
1955	$3.35	$3.93	$3.48
1956	3.92	4.59	3.74
1957	3.20 1/3	3.63 1/3	3.89
1958	3.13 1/3	3.72	3.80

[27] All coal mined by Phillips—premium and utility—was mined by the strip mine method (R. 175a).

These figures not only show an improvement in the average price of Phillips' coal when all Phillips' coal and not just its utility coal is considered but they also show, during the material period, that Phillips' average price for all coal was either above or substantially equivalent to the national average price for all strip mine coal.

The Sixth Circuit agreed (R. 1762) these factors could have the effect of reducing the difference between the national average price of all coals and Phillips' average price on the TVA spot market for steam coal; but, argued the Sixth Circuit, "in the light of other factors involved, . . . we do not think the comparison so unfair as to reject its consideration by the jury in its entirety in determining what, if any, damage Phillips suffered by reason of the conspiracy" (R. 1762). Discussion demonstrating the fallacy of the Sixth Circuit's arguments as to such factors appears herein, *post*, pp. 69-72.

D. THE ISSUE RELATING TO THE ADMISSION OF EVIDENCE AND JURY INSTRUCTIONS CONCERNING UMW'S EFFORTS TO OBTAIN A WALSH-HEALEY MINIMUM WAGE DETERMINATION AND TO HAVE TVA COMPLY THEREWITH

Both the trial court and the Sixth Circuit rejected UMW's complaint (R. 453-8a) that admission of evidence concerning the *Walsh-Healey* wage determinations, public hearings thereon, the issuance of an order setting such a wage rate, and Secretary of Labor Mitchell's statements at a UMW Convention concerning the determination, as well as UMW and operators' efforts to have TVA comply with the wage rate so determined, was prejudicially erroneous under *Noerr*, as was the trial court's instructing the jury such efforts were valid *unless* they produced a trade restraint (R. 1558a, 1587a) and the refusal to give a UMW proffered instruction omitting the "unless" provision.

SUMMARY OF ARGUMENT

I.

Contrary to this Court's prior decisions, the Sixth Circuit herein accords a federal district court jury the right to infer from, and to bring within *Sherman's* ban, bargaining techniques involving traditional union objectives of improved labor standards established in an industry-wide, multi-employer agreement, resulting from collective bargaining, obedient to directives mandated by a federal district court and under its scrutiny, and accepted as lawful by other federal agencies, and under which 82 per cent of all bituminous coal is produced. Collective bargaining agreements and union activities this Court held not to be within *Sherman's* purview and which are permissive or regulated by *Taft-Hartley's* Sections 7 and 8 may now be used by juries, under the Sixth Circuit's holding, from which to infer a *Sherman* violation.

The Sixth Circuit has so held upon a marginal coal producer's complaint that its existence depends upon a continuing ability to produce coal at labor-costs levels lower than those attained in the industry-wide agreement by reviving the conspiracy concept which federal courts, prior to national labor legislation, used to prevent labor's efforts to improve labor standards. Though in such legislation Congress sought to dissipate this abuse, the Sixth Circuit again sanctions its use. If the Sixth Circuit's pattern is approved, national labor policy will be in the hands of trial courts and juries, using the conspiracy concept to frustrate Congress' purpose in enacting national labor policy legislation, to thwart collective bargaining processes and to render abortive the immunities Congress granted labor in legislation, including the Clayton Act's Section 6, as this Court recognized.

The Sixth Circuit's condemnation of (1) UMW's achievement of high labor costs because UMW knew marginal coal producers could not pay such costs and would force them

out of the industry, and (2) labor-standards provisions stabilizing work opportunities for UMW members conflicts with labor legislation and *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, holding a union's "elimination of price competition based on differences in labor standards" is not the "kind of curtailment of price competition" which *Sherman* prohibits.

Support for *Apex'* conclusion, reiterated in *Allen Bradley* v. *Local Union No. 3*, 325 U.S. 797 and *U. S.* v. *Hutcheson*, 312 U.S. 219, came, as the Court avowed, from labor legislation of the 1930's. *Apex* avowed that, since enactment of *Clayton's* Section 6 immunity to unions, "restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees are not in themselves" violative of *Sherman*.

Legislation, after *Apex* and *Allen Bradley*, shows Congress intended union activities pertaining to collective bargaining and organizing to be sheltered from *Sherman*. *Taft-Hartley* regulated union-management relationships and committed enforcement to the National Labor Relations Board's exclusive competence. For violations for which a union should respond in damages Congress made specific provisions. Amendments in 1959 emphasized Congress' intent to bring employer-employee relations within *Taft-Hartley*, rather than *Sherman*, by rendering unlawful a union's engaging in product boycotts and for employers and unions to agree to engage in such product boycotts.

Apex and *Allen Bradley* reject the Sixth Circuit's conspiracy predicate that union activities attended by violence violate *Sherman*. Also, a *Taft-Hartley* proposal that *Clayton's* Section 6 immunity be withdrawn because of violence was deleted.

The same "potential conflict of rules of law, of remedy, and of administration" which supported this

Court's refusal to permit "two law-enforcing authorities" —state and federal— to deal with matters arguably within the Board's exclusive competence requires that problems relating to collective bargaining subject matters and procedures in *Taft-Hartley* be held to be outside *Sherman's* purview.

The Sixth Circuit ignored *Apex* and kindred cases, *Clayton's* immunity to labor, and *Hutcheson's* command to read *Sherman* and federal labor statutes as "interlacing statutes", which applies to conduct either regulated or sanctioned under *Taft-Hartley's* Sections 7 and 8.

Unless the Sixth Circuit is reversed, collective bargaining on a national scale stands imminently threatened. Every signatory to a multi-employer agreement becomes a suspect for *Sherman* violations by disgruntled marginal employers seeking to operate under standards lower than those achieved in industry-wide bargaining and in time to destroy those standards. The Sixth Circuit's doctrines thwart the public interest of national policy legislation because no labor union could expose itself to criminal, injunctive and monetary penalties imposed by the Sixth Circuit's pattern in discharging its bargaining duties and functions and as directed by government itself. And, for the same reasons, management too will be deterred from engaging in collective bargaining as commanded by national labor policy.

The Sixth Circuit renders collective bargaining illusory. Reversal is both appropriate and required.

II.

The Sixth Circuit's approval of the conspiracy finding based upon efforts of UMW and signatory operators to have the federal Secretary of Labor establish minimum wage rates for the coal industry on government purchases of coal under *Walsh-Healey* and to have

TVA comply with such determinations conflicts with *Eastern Rr. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 355 U.S. 127 (1961), holding that a campaign directed toward obtaining governmental action is "not at all affected by any anticompetitive purpose" thereof and that trade restraints resulting from valid governmental action do not fall within *Sherman's* ambit.

Noerr and *Riss* (D.C. Cir., 299 F. 2d 133) condemn the Sixth Circuit's sanction of the admission of evidence, the trial court's jury charge relating to activities noted and the trial court's refusal to give a UMW proffered instruction based upon the principle enunciated in those cases.

Since the jury's general verdict was based upon an erroneous instruction and improperly admitted evidence having no probative value, *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30, requires a reversal.

The Sixth Circuit approved the trial court's admission of U.S. Secretary of Labor Mitchell's statement at a UMW Convention concerning the minimum wage determinations and his investigating if TVA was evading them, with assurances of correction of violations, if any. Its sanction of the jury's use thereof as a "reasonable deduction" that the wage determinations contributed to Phillips' elimination as a competitor in TVA's spot market purchases placed the federal Secretary of Labor in a co-conspirator status. These rulings offend the principle that actions of public officials under authority of law do not constitute trade restraints interdicted by *Sherman*.

III.

No Sherman Act conspiracy to eliminate or injure small coal producers can be inferred from the facts herein. Neither UMW's collective bargaining achievements, its efforts

to have *Walsh-Healey* minimum-wage standards established and implemented for government purchases, nor violence attending union organizing activities, singly or collectively, constitute a predicate for a conspiracy finding or a jury inference of conspiracy. The Sixth Circuit's contrary conclusion conflicts with *Norris-LaGuardia's* requirement that union liability be based upon "clear proof". The trial court expressed doubt as to the evidence's sufficiency. The Sixth Circuit based its conclusion on evidence different from that relied on by the district court. The lower courts themselves demonstrate the lack of clear proof.

The insufficiency of proof becomes more apparent by the undisputed evidence which the Sixth Circuit, to reach its conclusion, had to ignore. No evidence in the case overcomes the thrust of the undisputed facts ignored by the Sixth Circuit.

The Sixth Circuit's use of UMW investments in West Kentucky as a basis for jury conclusion that UMW's purpose was to have a material, if not the dominant, voice in determining that company's policies and operations is challenged by undisputed evidence and lacks any evidentiary support whatever.

The charged conspiracy allegedly occurred in 1950, prior to UMW's acquistion of any West Kentucky stock and its becoming a UMW contract signatory. In purchasing stock UMW sought to expand job opportunities for its members. Six witnesses testify without contradiction that UMW proposed no policies with reference to West Kentucky's management, marketing or pricing policies. Five witnesses confirm testimony of West Kentucky's Vice President that its bids were his responsibiltiy; he formulated them; he never discussed them with UMW. The Sixth Circuit's contrary statement is "speculation run riot", condemned in *Moore* v. *C & O Ry. Co.*, 340 U.S. 573,

which makes clear that disbelief of the six witnesses' testimony "would not supply a want of proof" (p. 576).

Absent conspiratorial conduct, UMW could not be held accountable for West Kentucky's bidding on the TVA market. However, undisputed evidence shows the price decline resulted from forces unrelated to the alleged conspiracy. TVA's Annual Reports sustain this contention. West Kentucky bids on the TVA market were a matter of business judgment, lawfully motivated by a need for sales.

"Speculation cannot supply the place of proof". *Moore v. C & O Ry. Co.*, 340 U.S. 578. No substantial evidence supports the jury's conspiracy finding or the Sixth Circuit's justification therefor. Judgment should be entered for UMW.

IV.

Even were UMW guilty of the conspiracy charged, and it is not, the Sixth Circuit's sanction of the national average price of *all* types of coal in *all* markets as a standard for the assessment of damages is unwarranted under the undisputed evidence. Since the standard used was erroneous, the jury's award of damages was without substantial evidentiary support, was wholly speculative, and should be set aside.

ARGUMENT

I. A LABOR UNION MAY NOT BE HELD A CONSPIRATOR UNDER THE SHERMAN ANTI-TRUST ACT IN ACHIEVING AN INDUSTRY-WIDE, MULTI-EMPLOYER COLLECTIVE BARGAINING AGREEMENT, NEGOTIATED IN ACCORDANCE WITH PROCEDURES ESTABLISHED BY LAW, WHICH RESULTS IN STABILIZING WAGE RATES AND WORKING CONDITIONS AT LEVELS ABOVE THE ABILITY OF SOME EMPLOYERS TO PAY.

Section 1 of the Sherman Anti-Trust Act (15 USCA 1) provides, in part, that:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is . . . illegal".[28]

Under *Clayton's* Section 4 (15 USCA 15), "Any person . . . injured in his business or property", by reason of the foregoing "may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee" .

However, Section 6 of the Clayton Act (15 USCA 17) provides:

> "*The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor,* agricultural, or horticultural organizations, *instituted for the purposes of mutual help,* and not having capital stock or conducted for profit, *or to forbid or restrain individual members of*

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[28] Section 2 thereof (15 USCA 2) declares that:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .".

Likewise, Section 3 of the Sherman Act (15 USCA 3) also makes such contracts, combination in form of trust or otherwise, or conspiracy illegal.

such organizations, from lawfully carrying out the legitimate objects thereof; *nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.*"

The Sixth Circuit, as noted (pp. 14-18), bottomed its approval of the jury's verdict that UMW engaged in a conspiracy outside and beyond the *Sherman* exemption to labor unions upon (a) UMW's knowledge that higher wage costs would drive "weaker companies" from the industry, (b) violence attending union organizing, and (c) the "land-lease" and "protective wage" clauses.

The Sixth Circuit's conclusion, approving the jury finding of a conspiracy against UMW, stands for the proposition that a union, acting with employers as it must in the discharge of its collective bargaining function, restrains trade by exercising collective employee rights protected or regulated by *Taft-Hartley's* Sections 7 and 8 (29 USCA 157, 158) when, in consequence of the exercise of those rights, certain employers are excluded from an industry engaged in commerce. The Sixth Circuit's errors are manifest from the following:

A. This Court Has Recognized That Collective Bargaining Agreements Embodying Labor Standards Are Not Commercial Restraints Interdicted By Sherman.

Though *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, declared that to some undefined extent labor unions are subject to *Sherman* (p. 488), it also professed that restraints on the sale of employees' services are not commercial restraints and do not constitute conspiracies outlawed by *Sherman* (pp. 502-3).

Even *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797, which brought within *Sherman's* scope union "activities for the purpose of 'employer-help' in controlling markets and prices" (325 U.S. 808), recognized that *Sherman's* policy was "to preserve a competitive business economy"

with "the rights of labor to organize to better its conditions through the agency of collective bargaining". (325 U.S. 806), and that when a union acts alone in its own self-interest for betterment of its members, independent of nonlabor groups intent upon violating anti-monopoly laws, its acts are sheltered from penalties imposed under *Sherman.*

1. UMW's Knowledge That Marginal Coal Producers Could Not Pay Higher Labor Costs Does Not Bring UMW's Achievement Thereof in Its Collective Bargaining Agreement Within Sherman's Interdictions.

The Sixth Circuit's declaration that UMW knowledge "that the weaker companies could not meet the increased costs of wages and welfare fund payments required by the successive wage agreements, and that the increased costs in the successive wage agreements were geared to the abilities of the major coal companies to mechanize and not have their profits affected by the increased costs", as a basis for upholding the jury's conspiracy verdict against UMW, is challenged by pronouncements in *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, and *Apex.*

The primary purpose of organizing people into trade unions is to eliminate wage competition. Professing "Union was essential to give laborers opportunity to deal on equality with their employer", this Court in *American Steel Foundries* sanctioned its extension beyond one employer, saying, to render a union "at all effective, employees must make their combination extend beyond one shop" and continuing, "It is helpful to have as many as may be in the same trade . . . united, because, in the com-

petition between employers, they are bound to be affected by the standard of wages of their trade" (257 U.S. 209).

Consistent with UMW's historical policy of equal pay for equal services, and mirroring its goal that equal service or specially skilled services in a coal mine regardless of where a miner performs his service entitles him to equal pay (R. 414a), the 1950 Agreement and its amendments provided the terms under which miners producing 82 per cent of all bituminous coal mined in this country and Canada would work. Its industry-wide, multi-employer basis finds approval in *NLRB* v. *Truck Drivers Local Union*, 353 U.S. 87, 95, in which there is judicial recognition of Congress' refusal to interfere with multi-employer bargaining because of its being "a vital factor in the effectuation of the national policy of promoting labor peace to strengthen collective bargaining." UMW was not concerned whether the successive wage increases were "designed to meet the increased ability" of large companies to pay them (R. 401a). UMW sought to obtain "a compensatory rate for" services in an ultrahazardous industry, affected with much unemployment; UMW was representing the interest of UMW members and was not concerned with what operators would do as affecting those questions over which the UMW had no jurisdiction" (R. 401a, 404a).

Apex rejected restraints on the sale of employees' services as violative of *Sherman* "however much they curtail the competition among employees" (310 U.S. 503). Though recognizing that "successful union activity, as for example, consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences

in labor standards", nonetheless this Court continued in *Apex* (310 U.S. 503-4):

> *"Since in order to render a labor combination effective it must eliminate the competition from non-union made goods . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."*

But, what *Apex* avows to be permissive under *Sherman*, the Sixth Circuit condemns, averring UMW knowledge that marginal producers would be forced out of the industry because of inability to meet increased labor costs supplied requisite proof of the alleged conspiracy. Singularly, while *Apex's* holding is expressly made accommodative to the immunity given labor unions under *Clayton's* Section 6 (15 USCA 17) [310 U.S. 503], the Sixth Circuit ignores both *Apex* and the immunity[30] in considering the instant point. This Court continued to recognize in *Allen Bradley* that restraints pertaining to "labor standards" are entirely free from *Sherman's* proscriptions: "We may assume that" collective agreements "standing alone would not have violated the Sherman Act" (325 U.S. 809).

Since labor costs are a significant element of total costs in virtually all industries, it is necessarily foreseeable that elimination of competition in wages will reduce the area of costs within which competition exists and will have a tendency to eliminate from an industry those competitors who, for one reason or another, are dependent for survival on preservation of a more favorable employment cost struc-

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[30] The only reference the Sixth Circuit made in its opinion to the immunity provisions is in its statement that since *Allen Bradley* and other cases, the exemption exists only where a union acts alone in furtherance of its own purposes, but not where it combines with a nonlabor group to restrain competition in or monopolize marketing of goods in interstate commerce (R. 1750).

ture than their competitors. *Apex* took cognizance of these economic facts and held that such indirect restraint was not within *Sherman's* purview.

In obtaining for its members the 1950 Agreement and its successive amendments UMW was implementing federal labor policy enunciated in the Taft-Hartley Act. Though *Sherman* condemns a conspiracy in order to maintain freedom of commerce, *Taft-Hartley* likewise seeks "to eliminate the causes of certain substantial obstructions to the free flow of commerce" (29 USCA 151), and Section 6 of the Clayton Act expressly negates that labor organizations are illegal combinations or conspiracies in restraint of trade under *Sherman* and rejects judicial action which forbids union legitimate objects (A. 3a, 7-9a).

UMW did no more than pursue with historical vigor its legitimate aims as a labor union. In pressing its demands, UMW receded from bargaining positions, at times as required by judicial decree; and always, in light of industrial realities, when it appeared advantageous to UMW's membership to do so. With the right to terminate the national agreement on sixty days' notice (R. 1741a), it has retained its freedom and its willingness to strike the operators in support of bargaining demands.

Throughout the 1950's UMW pursued its traditional policy of achieving the highest level of wages and benefits for its members which could be paid by the industry without unreasonable economic attrition. Yet, UMW could implement its high wage policy only by collective bargaining and, ultimately, by agreement with operators.

2. The "Land-lease" and "Protective Wage" Clauses Are Lawful Subjects of Collective Bargaining.

Similarly, the Sixth Circuit's use of the labor contracts "land-lease" and "protective wage" clauses as circumstantial evidence warranting jury inference of a *Sherman* conspiracy is legally unjustified. Evidence pertaining to

these clauses has been detailed (*ante*, pp. 16-18). Both, the unassailed evidence shows, sought to protect wage standards and working conditions and opportunities of UMW members (R. 1108-9a, 448a). Both were insisted upon by UMW and resisted by operator signatories (R. 1111a, 1201a, 1205-6a).

The "land-lease" clause does not prohibit signatory operators from leasing their lands to non-signatories. Its sole restriction is that coal lands of signatories not be leased "as a subterfuge for the purpose of avoiding the application of this agreement". It sought to prevent operators from repudiating (R. 1202a) and "chiseling away at the agreement" by subleasing to irresponsible persons unable to meet wage obligations due coal miners (R. 1108a). Even had the "subterfuge" sentence been omitted, federal decisional law would impose an "implied covenant of good faith and fair dealing" and preclude leasing of mining operations to evade the performance of obligations under a collective agreement. *United Steelworkers, Local 4264* v. *New Park Mining Co.*, 10 Cir., 273 F. 2d 352, 356 (1959); cf. *Manners* v. *Morosco*, 252 U.S. 317. The fact that subcontracting is a bargainable issue [*Town & Country Mfg. Co.* v. *NLRB*, 5 Cir., 316 F. 2d 846 (1963); *Fibreboard Paper Prod. Corp.*, 138 NLRB 550, 551 (1962), enforced D.C. Cir., 322 F. 2d 411 (1963), cert. granted 375 U.S. 963] emphasizes the Sixth Circuit's error in employing the subject clause as justifying the jury to infer that UMW conspired with coal operators in violation of *Sherman*.

So, too, as to the "protective wage" clause, which sought, as the clause itself reads, "to provide the maximum possible continuity and stability of employment under the" agreement's provisions and by which signatory operators agreed their mines "shall be so operated as not to debase or lower" the wages and working conditions established in the UMW contract and by which operators agreed not to buy, process, sell, produce or handle coal produced at

standards lower than the UMW contract provided. Although the alleged conspiracy, which the Sixth Circuit held could be inferred from the "protective wage" clause, arose with the 1950 Agreement's execution, pre-existing contract provisions evidence UMW's historical concern with the coal industry's problems to which the clause is directed. Specific contract provisions antedating 1950—the beginning of the alleged conspiracy—expressly dealt with "subcontracting" as such and a "protective wage" clause as such.[31] As noted above, labor standard clauses by which a bargaining agent seeks to maximize employment for employees are mandatory bargaining subjects [*Town & Country Mfg. Co.*, (316 F. 2d 846) and *Fibreboard* (322 F. 2d 411)].

Since both the "land-lease" and "protective wage" clauses fall within the scope of collective bargaining, this Court's avowal in *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283 (1959), that inclusion in collective bargaining agreements of matters within the scope of mandatory collective bargaining may not be stamped with illegality under antitrust laws becomes cogent. Though *Oliver's* concern was whether a *state's* antitrust law could prevent parties to a labor agreement from carrying out their contractual obligations (358 U.S. 295), *Oliver's* rationale is equally apposite herein where a *Sherman* conspiracy finding is said to be warranted solely because a collective bargaining agreement contains matter which both federal courts and NLRB have professed to be mandatory subjects of collective bargaining.

In *Oliver*, this Court stated, "Within the area in which collective bargaining was required, Congress was not con-

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[31] The Southern Wage Agreement, effective April 1, 1941 contained a "Protective Wage Clause". The 1941 Agreement which is Exhibit 77 in the trial court record was not printed and does not appear in the certified appendix record herein.

cerned with the substantive terms upon which the parties agreed", that Taft-Hartley's purposes "are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves" and "To allow the application of the . . . antitrust law here would wholly defeat the full realization of the congressional purpose" and "frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving . . ." (358 U.S. 295-96). Moreover, to stamp such bargaining as conspiratorial under *Sherman* poignantly demonstrates that the right of collective bargaining is only illusory and "the road to prison" which *U. S.* v. *Hutcheson*, 312 U.S. 219, 234-35, rejects. The Sixth Circuit's warrant for the jury inference by use of the two contract clauses offends this Court's statement that a federal law is not "violated by the union acting precisely in accordance" with Congress' purpose "to obtain stability . . . in employment for workers" (*The Order of Rr. Telegraphers* v. *Chicago, etc. R. Co.*, 362 U.S. 330, 339-40).

3. Federal Legislation, Both Before and Following Apex and Allen Bradley, Shows Congress' Intent That Union Activities Pertaining to Organizing and Collective Bargaining Are Not to be Regulated by Sherman.

In *Apex's* holding that "elimination of price competition based on differences in labor standards" was not prohibited conduct under *Sherman*, this Court found support in, and took pains to state, that pre-*Apex* labor legislation reflecting national labor policy, such as Norris-LaGuardia, Wagner, Walsh-Healey and the Fair Labor Standards Acts, recognized "that combinations of workers eliminating competition among themselves and restricting competition among their employers based on wage cutting are not contrary to the public policy". *Apex* (310 U.S. 504, fn. 24). Indeed, the Fair Labor Standards Act

condemns "labor conditions detrimental to the maintenance of the minimum standard of living . . ." (29 USCA 202).

Notably, it was not until 1947—after *Apex* and *Allen Bradley*—that Congress undertook to regulate union conduct in relation to organizing activities and collective bargaining procedures. In its enactment, in 1947, of the Labor Management Relations Act, 1947 (called "Taft-Hartley"), one of its avowed purposes was to regulate union conduct which prevented "the free flow of goods . . . through strikes and other forms of industrial unrest or through concerted activities . . ." 29 USCA 151.[32] Significantly, its declaration of policy included recognition of the need for collective bargaining action because, in its absence, there exists inequality of bargaining power causing commerce to be burdened by "depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within . . . industries" (29 USCA 151). *Taft-Hartley* prescribed labor-management rules "to promote the full flow of commerce" (29 USCA 141). Enforcement of this code regulating union activities was committed to the National Labor Relations Board; and for activities for which Congress determined a union should respond in damages, it made specific provisions in Sections 301 and 303 of that Act (29 USCA 185, 187). In this enactment Congress affirmed *Apex'* judicial declaration of its purpose not to regulate union behavior attendant with union organizing and collective bargaining under *Sherman*.[33]

The congressional intent is emphasized by *Taft-Hartley's* Section 8(b)(4) [29 USCA 158(b)(4)] making it unlawful for a union to engage in product boycotts and Section 8(e) [29 USCA 158(e)] making it unlawful for both employers

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[32] The pertinent provisions of 29 USCA 141 and 151 are to be found in Appendix A hereto, pp. 7-9a.

[33] Congressional intent is further reflected in *Taft-Hartley's* legislative history discussed herein, *post*, p. 50.

and union to agree to engage in such product boycotts, as enacted in 1959.[34] See *Texas Millinery Co.* v. *United Hatters*, DC, N.D. Texas, March 24, 1964, 55 LRRM 2863, declaring that 26 USCA 158(e) clearly shows congressional intent to exclude union-induced agreements resulting in an employer's boycott of non-union products from *Sherman's* scope.

Oliver (358 U.S. 283) refused to permit federally-regulated collective agreements to be frustrated by state antitrust legislation. Where federal legislation, including that above noted, mandates parties "to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife" (*Oliver*, 358 U.S. 295) and has placed regulation thereof in the hands of a congressionally-selected administrative agency, namely, the National Labor Relations Board, *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, states that "When an activity is arguably subject to § 7 or § 8 of the Act, . . . *federal courts* must defer to the exclusive competence of the . . . Board." The same "potenial conflict of rules of law, of remedy, and of administration" (359 U.S. 242) which caused this Court to reject the right of "two law-enforcing authorities"—state and federal—to deal with matters arguably within the Board's exclusive competence apply with equal force if problems of wage and hour standardizations which Congress has committed to the Board may be placed before federal courts and juries under *Sherman*. Congress obviously was aware of *Apex'* and Allen Bradley's denial that labor-standards agreements were commercial restraints within *Sherman's* ban when it enacted the labor legislation. This awareness stresses its intent to exclude from *Sherman's* ban those matters of collective bargaining which Congress has regulated in Sections 7 and 8 of *Taft-Hartley*.

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[34] These statutes are found in Appendix A hereto, pp. 11-13a.

4. Both Apex and Taft-Hartley's Legislative History Reject Violence Attending Organizing Activities as Conduct Falling Within Sherman's Proscriptions.

The Sixth Circuit's holding that "it was *not error* for the jury to consider" evidence that UMW forcibly closed Phillips' operation "as bearing on the overall issue of whether such acts were done as part of a conspiracy to restrain competition or create a monopoly" (R. 1751) is in direct opposition to this Court's pronouncement in *Apex Hosiery Mills, Inc.* v. *Leader*, 310 U.S. 469, and to congressional intent, in passage of the *Taft-Hartley* law regulating labor unions, that behavior of those organizations as it pertains to wages and working conditions is not a matter for antitrust regulation.[35]

Even if the Sixth Circuit were accurate in stating Phillips' operations were forcibly closed, still, the activity there was for the purpose of having Phillips' employees join UMW. The Sixth Circuit's use of violence as a "principal factual aspect" to warrant the jury inference of a conspiracy stands in sharp contrast to this Court's pronouncement in *Apex* that "*Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence* (p. 513).[36] It is assailable too by *Hutcheson's* holding that "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit . . . are not to be distinguished by any

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[35] This is equally applicable to the Sixth Circuit's statements (R. 1756) that "The campaign to impose the wage contracts upon the smaller nonunion mines was intense after 1950" and "In areas of strong resistence mobs and terrorism were used."

[36] The Sixth Circuit's views are also disharmonious with the charge given the jury by the trial court that "if acts of violence are the only things . . . in this record, then such acts would not be a violation of the anti-trust laws" (R. 122a) and that "Acts of violence in and of themselves are not material to the determination of the question of whether the anti-trust laws were violated" (R. 1557a).

judgment regarding . . . the rightness or wrongness . . . of the end of which the particular union activities are the means" (312 U.S. 232).

Moreover, *Taft-Hartley's* legislative history militates against the Sixth Circuit. When the House of Representatives first passed H.R. 3020 it contained a proposal to amend the Clayton Act so as to withdraw from labor's immunity under Section 6 union activities involving force and violence;[37] but, as the House Conference Report stated, the provision was omitted from the conference agreement.[38]

5. The Sixth Circuit's Opinion Conflicts With Clayton's Immunity Provision. It Ignores Hutcheson's Requirement That Sherman and Other Federal Labor Statutes be Considered as "Interlacing Statutes".

The antitrust immunity of a union under *Clayton's* Section 6 exists for the precise purpose of preventing juries and courts alike from inferring the existence of a conspiracy on a union's part to restrain trade from sanctioned conduct. Otherwise, as the Sixth Circuit has achieved in the instant case, lawful exercise of collective employee rights would be converted into a conspiracy to restrain trade by imputing a purpose to obtain those effects on inefficient employers which are but the by-product of UMW's pursuit of its members' interests. In short, the problem is one of dual effect. When a union secures higher wages for its members, it benefits its members but may injure some employers. If its conduct can be adjudged in light of the effect on the injured employers, a union's immunity from *Sherman* is wholly illusory. So long as a union acts as agent of employees exercising collective rights guaranteed by *Taft-Hartley's* Section 7, it is not subject to liability under *Sherman* whatever the foreseeable economic consequences of its act.

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[37] Legislative History of the Labor Management Relations Act, 1947 (U.S. Government Printing Office, 1948), Vol. 1, pp. 158, 204-7, 219-21.

[38] Ibid, p. 569.

Indeed, *Allen Bradley* (325 U.S. 806) proclaims that conduct permitted by federal statutes "is not to be declared a violation of federal law".[39] *U. S.* v. *Hutcheson,* 312 U.S. 219, 232, which concerned *Norris-LaGuardia* and *Clayton's* Section 20 and mandated that allowable conduct is freed of a *Sherman* taint (p. 236), teaches that whether trade union conduct constitutes a *Sherman* violation depends upon reading *Sherman* and other federal labor statutes as "interlacing statutes". This is precisely what the Sixth Circuit failed to do. Indeed, the current vitality of *Norris-LaGuardia* and *Clayton* as ensuring that antitrust laws cannot be used to stifle legitimate labor union activities was recently acknowledged in *Los Angeles Meat, etc. Drivers Union* v. *U. S.,* 371 U.S. 94, 103.[40]

Hutcheson's command is equally apposite to conduct which finds sanction under *Taft-Hartley's* Section 7, and thus renders unavailable the use of an inference of conspiracy from permissible activity.

As noted (*ante,* pp. 46-49), since each of the factors before the jury falls within the scope of activities permitted or regulated by *Taft-Hartley's* Sections 7 and 8, clearly, no inference of conspiratorial conduct may be derived therefrom:

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[39] More recently, Mr. Justice Black declared, "It would stretch credulity too far to say that the Railway Labor Act, designed to protect . . . workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers." *The Order of Rr. Telegraphers* v. *Chicago, etc. R. Co.,* 362 U.S. 330, 339-40.

[40] Only recently Mr. Justice Goldberg, in a concurrence, in which Mr. Justice Brennan joined, of *Los Angeles Meat Etc. Union, Local 626* v. *U. S.,* 371 U.S. 94, 105, observed that resolution of antitrust violations concerned "consideration of federal labor policy, the scope of the antitrust exemption afforded labor organizations by Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act, as interpreted by United States v. Hutcheson, 312 U.S. 219 . . .". Both the Court's opinion by Mr. Justice Stewart and the concurrence challenge the Sixth Circuit's use (R. 1750) of *Los Angeles Meat Union.*

Conclusion on Argument 1.

The full effect then of the Sixth Circuit's holding, if a labor union is to avoid the charge of a *Sherman* conspiracy, is that wages and working conditions in a collective bargaining agreement must be restricted to those which the least efficient and the least successful coal operator in the industry could afford—a result totally inconsonant with UMW and all other legitimate unions' objectives and with national labor policy as provided for in the Clayton, Norris-LaGuardia, Taft-Hartley, as now amended, the Walsh-Healey and Fair Labor Standards Acts and federal decisional law implementing those statutes.

Phillips' own operation demonstrates how fallacious is the Sixth Circuit's views, for both *before and after* UMW organized Phillips' operation and it became a contract signatory, Phillips' wage rate was substantially less than the standard set for the industry by the UMW Agreement (R. 212-13a). Phillips was not a victim of UMW's wage policy but, to the contrary, used this cost advantage to engage in price cutting activities to deprive unionized operations of business. Phillips, with the Sixth Circuit's imprimatur, would reestablish the right to compete upon the basis of substandard wages and working conditions in producing goods for interstate commerce. Yet, federal legislation was enacted to eliminate that very competition.

Under the Sixth Circuit's views, if permitted to stand, parties negotiating a collective agreement will not sit at the bargaining table alone. One or more invisible parties will also attend. He or they will be "smaller", "weaker" or "competing" employers; and before signing, the bargainers must reckon with the fact that these invisible strangers may not be able, or indeed willing, to meet increases in labor benefits and labor costs which the bargaining may produce. Any such unwillingness or inability may become a basis for an alleged *Sherman* violation.

The speciousness of the Sixth Circuit's holding becomes manifest when it is considered that had wages and other labor costs not been increased, mechanization would have continued, since Phillips does not explain how it could be stopped, thus making it mandatory that UMW accept a wage scale below which major coal companies could afford to pay, thereby enriching the large operator at his employees' expense, or alternately, giving small operators a differential and thereby introduce into the coal industry the precise wage competition which it is UMW's purpose, as a union, accordant with federal labor policy, to eliminate.

Attainment of industrial peace in the coal industry has been a cherished federal government objective. Yet, in its accomplishment the Sixth Circuit finds an illegal conspiracy and that which Congress mandated in protection of the public interest has become a litigation trap for UMW.

But the thrust of the Sixth Circuit's opinion does not impinge upon UMW alone. Unless it is reversed, collective bargaining on a national scale stands imminently threatened. Every industry-wide collective bargaining agreement, every labor union and every employer signatory to a multi-employer agreement is rendered a suspect for charges of violating *Sherman* by one or more disgruntled marginal employers seeking to operate at wage levels lower than those achieved in industry-wide bargaining.

To let the decision stand is to invite chaos in the existing pattern of multi-employer national bargaining agreements attained only after a long, bitter and expensive experience and currently prevalent in all major industries in this country. If the Sixth Circuit's doctrine is permitted to stand, the public interest will be thwarted because no labor union could hereafter safely expose itself to criminal, injunctive and monetary penalties imposed upon it by the Sixth Circuit's pattern in discharging the very duties and functions constituting the purpose of its existence and as directed by government itself.

This Court's recognition in *Truck Drivers Local Union* (353 U.S. 87, 95)' of Congress' intent that unions and employers in industry-wide bargaining procedures may act in concert to equalize wages and that "Approximately four million employees are now governed by collective bargaining agreements signed by unions with thousands of employer associations" accentuates the Sixth Circuit's errors. Since judicial authority negates that Union activities pertaining to the accomplishment and implementation of labor standards are restraints outlawed by *Sherman*, the district court should not have permitted the jury, as a matter of law, to consider these matters in determining the conspiracy issue. Because the Sixth Circuit has used them as predicates to support the conspiracy finding, reversal of the Sixth Circuit's judgment is both appropriate and required.

II. WHERE A LABOR UNION AND EMPLOYER SIGNATORIES TO A COLLECTIVE BARGAINING AGREEMENT OBTAIN FROM THE UNITED STATES SECRETARY OF LABOR, UNDER THE WALSH-HEALEY ACT, A MINIMUM WAGE RATE FOR THE BITUMINOUS COAL INDUSTRY ON COAL PURCHASED BY FEDERAL AGENCIES, AND SEEK TO HAVE TVA COMPLY THEREWITH, SUCH UNION ACTIVITY IS NOT CONSPIRATORIAL CONDUCT UNDER THE SHERMAN ANTI-TRUST ACT.

A. The Sixth Circuit's Holding That Efforts to Obtain Minimum Wage Determinations Under the Walsh-Healey Act and to Have TVA Comply Therewith Constituted Evidence From Which the Jury Could Infer a Sherman Conspiracy Conflicts With a Prior Decision of This Court and With a Decision of the District of Columbia Court of Appeals.

A material part of Phillips' theory, discussed at length by the Sixth Circuit (R. 1758-61), relates to Phillips' partial exclusion from the TVA market by reason of the Walsh-Healey Act which requires government contractors on contracts of $10,000 or more to pay "prevailing minimum wages" and empowers the Secretary of Labor to make that wage determination. Efforts of UMW and operators signatory to the National Agreement pertaining to

the TVA market and the minimum wage determinations are discussed, *ante*, pp. 19-21. Phillips' wages were well below *Walsh-Healey's* requirements, and it was thus foreclosed from the TVA markets on contracts of $10,000 or more.

The Sixth Circuit held that "it was a reasonable deduction which the jury could make that the wage determination for the coal industry under the Walsh-Healey Act . . . materially and adversely affected the operations of Phillips in the important TVA market, thus contributing to the elimination of the company as a competitor to the large coal producing companies operating in that area, including the West Kentucky Coal Company, in which the UMW had such a dominant interest" (R. 1760-1). The Sixth Circuit's use of this holding in sustaining the jury verdict conflicts with this Court's prior construction and interpretation of *Sherman* in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and the District of Columbia Court of Appeals' decision in *Assn. of Western Railways* v. *Riss & Co., Inc.*, D.C. Cir., 299 F. 2d 133 (1962).

Walsh-Healey's purpose "is to use the leverage of the Government's immense purchasing power to raise labor standards." *Endicott Johnson Corporation* v. *Perkins*, 317 U.S. 501, 507. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128, was positive in asserting Congress' purpose to withdraw government business from those "tending to depress wages . . . and offending fair social standards of employment." Yet the Sixth Circuit's opinion holds that campaigns and actions directed by a union and employers toward obtaining government action may be treated as illegal and serve as a basis for the imposition of judgments for *Sherman* violations. This is precisely what this Court rejected in *Noerr*, saying (365 U.S. 135) that no *Sherman* violation can be predicated upon mere attempts to influence "the passage or enforcement of laws", and that "The

right of the people to inform their representatives in government of their desires with respect to the *passage or enforcement of laws cannot properly be made to depend upon their intent in doing so*" (p. 139).

As in *Noerr*, the issue here is whether the efforts of UMW and certain coal operators to bring about governmental action is proscribed by *Sherman*. The district court reasoned that it was so regulated *where its purpose was to effect a trade restraint* (R. 456-57a). The Sixth Circuit held (R. 1764) that such action was lawful *only where "unaccompanied by a purpose or intent to further a conspiracy to violate a statute."* But this Court's *Noerr* rejects this view by declaring "that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, *its legality was not at all affected by any anticompetitive purpose* it may have had" (365 U.S. 139-40), and that *"where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out"* (p. 136).

Though in *Noerr* the "sole purpose" of the railroads *"in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors"* (365 U.S. 138), the Sixth Circuit would have the issue here turn on whether it was UMW's purpose "to drive small coal operators out of business".

Nor is the Sixth Circuit's decision herein reconcilable with the District of Columbia Court of Appeals' *Riss* case, which, implementing *Noerr*, noted that "joint solicitation of government action with respect to the passage or enforcement of laws does not violate the Sherman Act, *even it its purpose is to destroy competition*" (299 F. 2d 135).

The Sixth Circuit's opinion challenges Congress' objective in enacting the Walsh-Healey Act by permitting persons having contracts with the Government to deal with

"forces tending to depress wages and purchasing power and offending fair social standards of employment". *Perkins* v. *Lukens Steel Co.*, 310 U.S. 128.

B. The Sixth Circuit's Sanction of the Admission of Evidence and the Jury Charge Relating to UMW's Efforts to Obtain Walsh-Healey Determinations and to Have TVA Comply Therewith Conflicts With the Noerr and Riss Cases.

In both the trial court and the Sixth Circuit UMW urged not only that UMW's efforts to obtain a Walsh-Healey minimum wage determination and to have TVA comply therewith constituted lawful activity and did not evidence a conspiracy unlawful under *Sherman* but that there was reversible error in its admission. Similarly it pressed upon both courts that the district court's instruction, charging the jury that such activity was not violative of *Sherman unless* the jury found it was a part of a conspiracy to drive small operators out of business (R. 1558a, 1587a), conflicted with *Noerr;* and consonant with that position UMW offered, but the trial court rejected, UMW's request No. 53, which omitted the "unless" portion of the court's instruction (R. 1582a).[41] The Sixth Circuit rejected UMW's contentions and sanctioned both the admission of the evidence and the trial court's jury charge (R. 1763-64). The discussion under Argument II-A showing that *Noerr* rejects the subject evidence as having no probative worth in establishing a conspiracy is equally apposite to these rulings of approval by the Sixth Circuit.

The Court will recall the jury finding of conspiracy was a general one wherein the jury verdict did not explain which of the factors admitted in evidence it believed supported the verdict. Since the trial court erred under *Noerr* in the admission of evidence and in charging the

[41] In the Sixth Circuit, in addition to *Noerr*, UMW relied also upon *Riss* (299 F. 2d 133).

jury, and because the jury verdict may have rested upon this erroneous theory, "it is unnecessary . . . to explore the legality of the other theories". *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, wherein (pp. 29-30) approval is given to the rule of *Maryland use of Markley* v. *Baldwin*, 112 U.S. 490, 493, as pertains to a general verdict: "[I]ts generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld . . ." (370 U.S. 30).

C. The Sixth Circuit's Sanction of the Admission of Evidence Placing the Secretary of Labor in the Role of a Co-Conspirator Offends the Rule That the Sherman Act Is Not Applicable to Authorized Actions of Public Officers.

Under Argument II-B it has been shown that *Noerr* and *Riss* reject evidence of UMW's efforts in obtaining *Walsh-Healey* minimum wage determinations and TVA's enforcement of them. This evidence included the convention statement of Secretary of Labor Mitchell concerning these determinations and their enforcement in connection with TVA's coal purchases (*ante*, pp. 20-21).

The Sixth Circuit sanctioned (R. 1759-61) the admission of Mitchell's convention speech, and its use by the jury as a "reasonable deduction" that the wage determination under *Walsh-Healey* contributed to Phillips' elimination as a competitor in TVA's spot market purchases. In so doing, the Sixth Circuit violated the rule enunciated by this and other federal courts that actions of public officials pursuant to and under authority of law do not fall within the trade restraints interdicted by *Sherman*. *Parker* v. *Brown*, 317 U.S. 341, 350; *Stroud* v. *Benson*, DC, E. D. North Carolina, 1957, 155 F. Supp. 482, vacated on other grounds, 4 Cir., 254 F. 2d 448, cert. den. 358 U.S. 817; *Miley* v. *John Hancock Mut. L. Ins. Co.*, D.C., Mass., 1957, 148 F. Supp. 299, aff'd., 1 Cir., 242 F. 2d 758, cert. den. 355 U.S. 828.

Conclusion on Argument II.

Argument II's discussions demonstrate that not only does the evidence pertaining to UMW's efforts in obtaining *Walsh-Healey* minimum wage determinations and in having TVA comply therewith show *permissive, not conspiratorial conduct,* under *Sherman,* but also that errors committed in the admission of evidence and in the jury charge, as well as the refusal to charge the jury as UMW requested, necessitate the award of a new trial.

III. THE SIXTH CIRCUIT HAS ERRONEOUSLY SANCTIONED A JURY CONSPIRACY FINDING WHICH, AS A MATTER OF LAW, HAS NO SUBSTANTIAL EVIDENTIARY PREDICATE

1. UMW's Evidence Denying the Conspiracy Is Unassailed.

Phillips asserted that at the time of the 1950's execution there was an "*express understanding*" between UMW and major coal companies that stabilizing the coal industry's economics "was to be taken care of by eliminating the smaller and weaker companies in great numbers, leaving the industry to the major coal companies alone" (R. 51a). Both UMW's John L. Lewis and John Owens denied the charged conspiracy or any agreement other than the 1950 collective bargaining contract. *No evidence disputes these denials;* yet the Sixth Circuit declared it a jury function to appraise witnesses' credibility, ignoring the principle in *Pennsylvania Rr. Co.* v. *Chamberlain,* 288 U.S. 333, 343, that fact finders are not at liberty, *under guise of passing upon a witness' credibility,* to disregard his testimony when from no reasonable point of view is it open to doubt. Similarly, *Moore* v. *C & O Rr. Co.,* 340 U.S. 573, holds that mere disbelief of witnesses' testimony "would not supply a want of proof" (p. 576). Accord: *Hazel Atlas Glass Co.* v. *NLRB,* 4 Cir., 127 F. 2d 109, 115.

2. The Sixth Circuit Totally Ignored the 1950 Federal Court Proceedings.

Phillips' assertion "the conspiracy charged was formed with the making of the 1950 National . . . Agreement" and the Sixth Circuit's approval of the jury's conspiracy finding must be appraised in light of undisputed evidence detailing the litigation story which attended the 1949-50 negotiations preceding that Agreement which, as the record establishes (R. 1474-93a), discussed *ante*, pp. 5-7, mirrors the at-arms-length dealings between UMW and operators.

It is against solid sense that UMW and operators *ordered by a federal district court* to bargain in good faith would have conspired as Phillips charges when they were under the scrutiny, surveillance and vigilance of a federal court, the President of the United States, a Presidential Board of Inquiry, and NLRB. The litigation was a *cause celebre*. Cast in the role of settling their dispute, UMW and operators were the center objects of an intense vigilance by governmental agencies determined not only that the dispute be settled, but settled accordant with law. Though UMW and operators were the primary actors in the dispute's solution, federal agencies played a dominant role. Dismissal of the variant litigation already noted (*ante*, p. 7) *upon UMW's compliance* fully supports its contention there was no conspiracy. To say the bargaining agreement thus achieved is tainted, is to point tacitly an accusing finger at those federal agencies. Only by stamping the litigation as pretensive and fraudulent could it tenably be said that UMW combined and conspired with non-labor groups to secure a result condemned by *Sherman*.

Whereas, the trial court believed the 1950 court proceedings and the negotiations pursuant thereto, weakened, if not destroyed, Phillips' conspiracy charges (*ante*, p. 13), pertinently the Sixth Circuit's opinion completely avoids them—and understandably so, since they militate against and completely challenge the conspiracy finding.

3. The Sixth Circuit Was Not Warranted in Approving the Jury's Inference of the Conspiracy Based Upon Union Activities Sanctioned by Law or Within the Jurisdiction of the National Labor Relations Board.

The jury verdict was responsive to a *general verdict form*, making it impossibe to know which of the variant factors offered by Phillips the jury believed proved the conspiracy. Nor did the verdict inform UMW with whom it purportedly conspired.

The Court will recall that the Sixth Circuit and the district court based their responsive approvals of the jury verdict upon totally different elements.

The trial court, expressly troubled by UMW's directed verdict motions which it appraised as "serious" and "debatable" (R. 1532-33a), found "substantial evidence" in "*some* proof . . . that Union representatives and large coal operator representatives discussed stabilization of prices at one time or another during the critical periods referred to in the cross-claim" (R. 87a). But UMW evidence denied making any agreement with coal operators to influence pricing of coal (R. 1139a, 1189a, 1224-25a); its evidence denied that "stabilization" related to excessive production (R. 390a), yet affirmatively avowed that talk of a stabilization plan "has no basis of fact" (R. 315a); and even Phillips' own witness George Love (coal operators' representative) testified that stabilization did not revolve around working time (R. 539a).

Significantly, the district court specified no evidence to support its finding. The Sixth Circuit made no reference to the district court's finding, obviously discarding it as a predicate for the conspiracy finding because of UMW's assertion in that appellate court that the district court's finding lacked evidentiary support.

Instead, the Sixth Circuit, as has been shown (*ante*, p. 14), reverted to activities, as circumstantial evidence warranting jury inference of a conspiracy, which, except

for UMW's investments in West Kentucky, are regulated by *Taft-Hartley* or *Walsh-Healey*—and not by *Sherman*.

The fallacy of the Sixth Circuit's use of UMW's knowledge of the effect of increased labor costs on so-called "weaker" companies, of contract provisions concerning labor standards, and of violence has been fully demonstrated (*ante*, pp. 38-54). Likewise, it has been shown (*ante*, pp. 54-59) that the Sixth Circuit's use of UMW's activities in connection with obtaining, under *Walsh-Healey*, minimum wage determinations and having TVA comply therewith is challenged by *Noerr* (365 U.S. 127) and *Riss* (299 F. 2d 133). Even if these cases were inapposite, lawful union objective (protection of UMW membership) distinguished from management's protection of business interests negates a *Sherman* conspiracy.

The Standard of Proof Sanctioned Herein By the Sixth Circuit Conflicts Both With Norris-LaGuardia's Standard of Clear Proof and With Clayton's Immunity Provisions

Norris-LaGuardia's command in its Section 6 is that union liability be shown by *clear proof* (A. 6a). A basic purpose of that section was to insulate labor unions against liability except upon that standard of proof. Congress' intent and will was that union liability should rest upon factual realities rather than suspicion, speculation and conjecture. Yet, the Sixth Circuit's opinion warranting jury inferences concedes the lack of a *clear-proof predicate* for the jury's conspiracy finding.

Moreover, the Sixth Circuit's sanction of the jury's inferring the conspiracy, and particularly in warranting the jury's use of inference from conduct sanctioned or regulated by *Taft-Hartley* or *Walsh Healey*, does not implement Congress' will that union activities be immunized from *Sherman's* proscriptions.

Indeed, where Congress has so immunized union activities as to preclude their falling within the scope of banned

conduct under *Sherman* and has commanded that union liability shall not be imposed except upon clear proof of responsibility, it follows that so long as charged conduct proves no more than the achievement of lawful union objectives, whether within sanctioned conduct under Taft-Hartley or Walsh-Healey, or activities juridically declared not to fall within *Sherman's* ambit, or, in the event of violence, then not within *Sherman's* prohibitions, it is wholly impermissible for a jury to infer therefrom a *Sherman* violation. To the contrary, any inference derivative therefrom must be one of legality.

4. The Sixth Circuit's Use of UMW's Investments in West Kentucky and That Company's TVA Bids as Circumstantial Evidence of the Conspiracy is Unsupported by, and is Contrary to, Undisputed Evidence.

The Sixth Circuit's employment of UMW's investments in stock ownership of West Kentucky and loans to other stockholders secured by shares of that company's common stock as a basis "for the jury to conclude from these facts that it was" UMW's purpose "to have a very material voice, if not the dominant one, in determining the policies and operations" of West Kentucky and Nashville Coal, its subsidiary (R. 1757-58), totally lacks any evidentiary support and is wholly contrary to the undisputed evidence.

While the Sixth Circuit sanctioned the use of UMW's investments in West Kentucky as a warranted predicate for the jury's conspiracy finding, it is notable that the conspiracy charged allegedly occurred in 1950 *at a time prior to any acquisition of stock by UMW in West Kentucky and when West Kentucky was not a signatory to the UMW contract and therefore could not have been a participant in the alleged conspiracy.*

Moreover, nothing disputes UMW testimony that its investments in West Kentucky sought the "wider . . . and the greater employment of" UMW members (R. 1124a). Though UMW achieved its collective agreement with West

Kentucky only after UMW purchased West Kentucky stock, the undisputed evidence is that no pressure was had upon the company to force the agreement's execution. As the record shows (R. 1444a), it was executed by West Kentucky only upon evidence that its employees had, in writing, selected UMW as bargaining agent. Thus, UMW pressed for an agreement as national labor policy permits and protects. West Kentucky's execution of the labor agreement accorded too with such policy. In so doing, both UMW and West Kentucky showed respect for the law, from which no inference of a conspiracy could be warranted.

Six witnesses testifying *without contradiction* that UMW made no suggestions and proposed no policies with reference either to the company's management, marketing or pricing policies (R. 492a, 585a, 1127a, 1128a, 1211a, 1404a, 1406a, 1445a) challenge the Sixth Circuit's unwarranted and unsupported assertion that UMW's purpose for its investments in West Kentucky was to have "a very material voice, if not the dominant one", which is wholly without evidentiary support. Indeed, since the Sixth Circuit has coupled the "dominant interest" in West Kentucky which it attributed to UMW with its unwarranted assertion of West Kentucky's dumping of coal on the TVA spot market to warrant the inference of the conspiracy charged, emphasis must be placed upon testimony of West Kentucky's Vice President Hoffman, who formulated West Kentucky's bids on the TVA market, that he never talked with UMW and had no agreement or understanding with UMW concerning such bids R. 1404a, 1406a). The Sixth Circuit's contrary statement is "speculation run riot" condemned in *Moore* v. *C. & O. Ry. Co.*, 340 U.S. 573, 578, which makes clear that the Sixth Circuit's disbelief of the testimony of the six witnesses "would not supply a want of proof" (340 U.S. 576).

Moreover, in the absence of testimony disputing the reasons for UMW's investments and that UMW took no part

in the management or pricing policies of the two coal companies, the Sixth Circuit's avowal that the jury could conclude UMW's purpose was to have a "material" or "dominant" voice in the companies' policies and operations is challenged, *first*, by the rule that a jury is not at liberty to disregard testimony when from no reasonable point of view it is open to doubt (Cf. *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333, 343); and *secondly*, the jury was never so instructed in the trial court but, to the contrary, it was told that "The fact that the Union was able to make investments of considerable size with its assets, does not constitute a violation of the anti-trust laws" (R. 1556a).

Since, in the absence of conspiratorial conduct, UMW could not be made accountable for West Kentucky's bids on the TVA market, it is legally irrelevant whether or not that company improperly "dumped" coal thereon, nevertheless the Sixth Circuit's conclusion that the jury appropriately inferred a *Sherman* conspiracy from "the dumping of West Kentucky coal on the TVA market" is challenged both by the record evidence and by applicable law.

Recital of undisputed facts, already detailed (*ante*, pp. 22-27), abundantly shows the price decline and "large offerings of tonnage on the TVA spot market at generally declining prices" by West Kentucky and Nashville Coal, in addition to Pittsburgh-Midway Coal Co. and Peabody Coal Co., which the Sixth Circuit found warranted the inference of a conspiracy (R. 1760), resulted from forces unrelated to any alleged conspiracy. Just as there is no evidence of any agreement of predatory pricing between UMW and West Kentucky, similarly no testimony connects UMW and the other companies in agreements which *Sherman* proscribes.

West Kentucky, the evidence shows (*ante*, p. 26) followed but did not lead the market. Its bids on the TVA

spot market were a matter of business judgment, lawfully motivated by a need for sales (*ante*, pp. 26-27).

A report of the House Committee on the Judiciary quoted with approval in *Balian Ice Cream Co.* v. *Arden Farms*, D.C., S.D. Calif., 1952, 104 F. Supp. 796, 801,[44] gives further answer to this contention:

> "In any competitive economy we cannot avoid injury to some of the competitors. *The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss.* That businessmen lose money or *even go bankrupt does not necessarily mean that competition has been injured* . . . We cannot *guarantee competitors against all injury.* This can only be accomplished by *prohibiting competition.*"

5. The Jury's Conspiracy Finding is Without Any Substantial Evidence to Support it.

In *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 3 Cir., 297 F. 2d 199, 202-3 (1961), as here, *plaintiff offered no direct proof of conspiracy*, and *defendants denied any conspiracy agreement*, the Third Circuit declared, "But it is the fact that *conspiracy remains an essential ingredient* of a" *Sherman* case. Though verdicts premised upon circumstantial evidence in antitrust cases have been sustained, "To sustain a finding of fact the circumstances proven must lead . . . with *reasonable certainty* and must be of such probative force as to create the basis for a *legal inference* and not mere suspicion." *Wesson* v. *U. S.*, 8 Cir., 172 F. 2d 931, 933; accord, *Pevely Dairy Co.* v. *U. S.*, 8 Cir., 178 F. 2d 363, 370. So, too, in *U. S.* v. *Morgan*, D.C., S.D.N.Y., 1953, 118 F. Supp. 621, 634, Circuit Judge Medina cogently remarked, "*Either there is*

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[44] Affirmed 9 Cir., 231 F. 2d 356 (1955), cert. den. 350 U.S. 991. See also *Ben Hur Coal Company* v. *Wells*, 10 Cir., 242 F. 2d 481, 486 (1957). The italicized text in *Balian* is that of the district court.

some agreement, combination or conspiracy or there is not" and the answer must be found in evidence adduced and not "in some crystal ball or vaguely sensed by some process of intuition, based upon a chance phrase used here or there."

In upholding the jury verdict, the Sixth Circuit not only employed activities which were either permitted or regulated by labor statutes but it treated the elements it regarded as circumstantial as if they were totally isolated from collective bargaining processes and procedures, as if *Hutcheson* had not mandated that "whether trade union conduct constitutes a violation of" *Sherman* depends upon interpreting statutes expressing national labor policy as "interlacing statutes", as if *Norris LaGuardia's* Section 6 did not command union guilt and responsibility be shown by clear proof, and as if there were no need of accommodating *Sherman's* policy to preserve a competitive business economy with "the rights of labor to organize to better its conditions through the agency of collective bargaining" (*Allen-Bradley*, 325 U.S. 806).

As to the remaining element used by the Sixth Circuit to warrant the jury's inference of the conspiracy, namely, UMW investments in West Kentucky, it has been shown (*ante*, pp. 63-66) that such investments primarily related to UMW achievements of lawful labor goals and that undisputed evidence established UMW neither controlled, nor sought to control, West Kentucky's management, or its marketing or pricing policy; but that, to the contrary, it had nothing to do with any of them. Notably, while the Sixth Circuit does not directly charge UMW therewith, it obliquely implies it did so by declaring it was UMW's purpose "to have a very material voice, if not the dominant one, in determining policies and operations of West Kentucky and its subsidiary, Nashville Coal. Even had this been UMW's purpose—and undisputed evidence is to the contrary—the fact remains that its investments

stood isolated and separate and apart from West Kentucky's management and its policies.[45]

Conclusion on Argument III.

The foregoing demonstrates that a jury verdict of conspiracy under *Sherman* may not be inferred from a showing that arms-length industry-wide collective bargaining has resulted in increased wage scales and welfare fund contributions and in contract prohibitions against buying from or leasing to employers whose labor standards are below those required of contract signatories; efforts to persuade the United States Secretary of Labor to establish and enforce, in accordance with the law, minimum wage standards for government purchases; and acquisition by the union, acting independently, of security of one of the alleged co-conspirators.

The Sixth Circuit, like the jury and the Trial Court, ignored the rule given by the district court to the jury that "if two inferences can be reasonably drawn from the same facts, one pointing to culpability and the other to innocent conduct then it is your duty to infer that which indicates innocent conduct" (R. 1560a).

Where, as herein, (1) UMW's evidence denying the conspiracy is unassailed, (2) the Sixth Circuit totally ignored federal court proceedings attending the negotiations and

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[45] Since the Sixth Circuit has justified the jury's conspiracy finding upon UMW's investments in West Kentucky, it is appropriate to direct this Court's attention to the fact that the trial court, in its jury charge, instructed the jury that it does not constitute a *Sherman* violation for a union to make substantial investments in a company engaged in producing bituminous coal or to finance others in their acquisition of control in a company for the purpose of having it recognize and bargain with the company (R. 1557a). Hence, had the jury premised its conspiracy finding upon such investments—which is the element the Sixth Circuit employs to justify the jury finding—the jury would not have followed the district court's instructions.

execution of the 1950 contract at the very same time it was alleged there was an express understanding constituting the conspiracy, (3) admittedly there is no direct evidence of the conspiracy, and (4) the inferences upon which the Sixth Circuit warranted the jury's verdict of conspiracy are legally impermissible, there is no substantial evidence to support either the jury's conspiracy finding or the Sixth Circuit's justification therefor. As said in *G. & P. Amusement Co.* v. *Regent Theater Co.*, DC, N.D. Ohio, 1952, 107 F. Supp. 453, 461, "the claimed existence" of a conspiracy herein is to be "*found in constant assertion*" *by Phillips* "*rather than* in the proof."

Heretofore, this Court has made it plain that "Speculation cannot supply the place of proof" (*Moore* v. *C. & O. Ry. Co.*, 340 U.S. 573, 578) and that "mere speculation be not allowed to do duty for probative facts" (*Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 32). Implementation of this principle to the case at bar makes it clear the jury should not have been given the task of finding a verdict; that the trial court erred in denying motions for directed verdict and that the Sixth Circuit's criteria of circumstantial evidence does not constitute substantial evidence requisite to sustaining a jury verdict. Corrections of these errors by this Court's reversal of the judgments entered by both the Sixth Circuit and the trial court and its direction of judgment in favor of UMW is appropriate.

IV. THE JURY AWARD WAS WITHOUT SUBSTANTIAL EVIDENCE TO SUPPORT IT. THE STANDARD SANCTIONED BY THE SIXTH CIRCUIT FOR ITS ASSESSMENT IS UNWARRANTED BY THE UNDISPUTED EVIDENCE AND IS ERRONEOUS AS A MATTER OF LAW.

As already noted (*ante*, pp. 27-31), and as the Sixth Circuit observed (R. 1761-62), UMW challenged the evidence's sufficiency to sustain any award of damages and asserted the national average price of all kinds of coal does not afford a valid basis of comparison with Phillips' TVA coal.

To overcome the variant factors which UMW contended supported its position and which the Sixth Circuit admitted could reduce the difference between national average and Phillips' average receipt prices, the Sixth Circuit opined that other factors kept the "comparison" from being "so unfair" so as to warrant the jury's considering "national average" (R. 1762).

To UMW's argument that national average price of all coal is substantially above national average price of strip mine coal, the Sixth Circuit declared this was overcome by the difference in BTU content, the national average being 12,900 whereas the county in which Phillips operated had an average of 13,200 BTU and that there was a guaranteed minimum of 13,215 BTU per pound in Phillips' coal (R. 1762).

To UMW's assertion that the utility market is the lowest coal market in price, the Sixth Circuit pointed out that "the market for steam coal was not restricted to the utilities, but included industrial concerns and railroads" (R. 1762). This fact does not affect UMW's argument that utility market coal—even if used also by industrial concerns and railroads—costs two to three dollars FOB mine lower than premium coals included in the national average; that steam coal (whether used by utilities, industrial concerns or railroads) costs at least one dollar less than commercial stoker coal included in the national average; that such steam coal costs at least two or three dollars per ton less than metallurgical coal included in the national average; and that such steam coal is lower in price than the price commanded by coke and industrial coals, also included in national average.

Similarly, the Sixth Circuit fails to dissipate UMW's challenge of "national average price" on the ground that Phillips sold its premium coal *separately* from utility coal *but excluded the price it received therefor* in comparing its average with the national average. The Sixth Circuit's answer that "the higher priced coal sold at retail had

fallen from 20 per cent of the total in 1940 to 8 per cent in 1958" (R. 1762) is obviously abortive, for the fact still remains that, whatever the percentage, national average includes the premium coal whereas Phillips' average price admittedly excluded it! While the Sixth Circuit (R. 1762) noted that there was evidence—disputed—that the difference between national average price for all coal and the price received by Phillips' for steam coal was not "materially affected" by the exclusion of Phillips' sales of premium coal, the admitted fact of its exclusion abundantly demonstrates that the predicate of national average price was not an appropriate standard for the assessment of damages.

Notably, the Sixth Circuit does not undertake to answer UMW's criticism of "national average price" as a standard for the assessment of damages on the ground that that average necessarily contemplates sales on differing markets; that Tennessee does not afford a market for quality coals comparable to the national market; and that during 1956-58 (the years in question) from 70.2 to 78 per cent of Tennessee coal was sold to TVA's utility coal market (R. 813a).

Nor does the Sixth Circuit concern itself with the undisputed facts that Phillips sold its coal on TVA's *lower priced spot market* where prices were one and a half to two cents per million BTU's (about 50 cents per ton) (R. 1396a) less than prices on TVA's higher term market.[46]

Where plaintiffs in antitrust cases have failed to prove injury resulting from alleged antitrust violations, judgment for the party sued has been approved *Wolfe* v. *National Lead Co.*, 9 Cir., 225 F. 2d 427 (1955). Where, as here, the facts underlying a jury award are fallacious, the Sixth Circuit in *Volasco Products Company* v. *Fry*

[46] The difference in price was urged by Phillips not only as a measure of damages, but as evidence of the fact of conspiracy as well (R. 53-54a, 114-116a). The lawful economic reasons for the price difference, manifest in the foregoing discussion, invalidates the judgment of the Sixth Circuit both from the standpoint of liability and the quantum of damages.

Roofing Company, 6 *Cir.*, 308 F. 2d 383 (1962), cert. den. 372 U.S. 907, rejected and reversed a judgment based thereon.

Since the standard of damages was an improper one, the jury award had no evidentiary support. Damage awards based upon speculation are not warranted. Cf. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1961); also *Sunkist Growers, Inc.* v. *Winckler and Smith Citrus Products Co.*, 9 Cir., 284 F. 2d 1, 32 (1960), reversed on other grounds, 370 U.S. 19.

This Court should, for reasons herein discussed, set aside the jury's award of damages and reverse the Sixth Circuit's judgment of affirmance of the trial court based thereon.

CONCLUSION

UMW submits this Court should reverse and set aside the judgment of the Sixth Circuit herein complained of (R. 1768), as well as the district court's judgment of August 2, 1961 (R. 82-4a), set aside the jury verdict, and remand the case with directions that judgment be entered for UMW or, in the alternative, that UMW be granted a new trial.

Respectfully submitted,

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